

Presented to

The Hon'ble Mr Justice V. G. A. Edgley,
MA. I. C. S.

With kind regards

Hemendra Chandra Sen.

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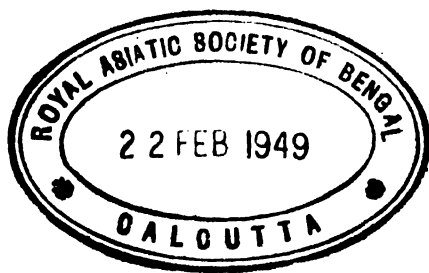
RAI SURENDRA CHANDRA SEN BAHADUR'S
BENGAL TENANCY ACT
(VIII OF 1885)

*[As modified by subsequent enactments
up to Act VI of 1938]*

WITH
NOTES, COMMENTARIES, ETC., AND CASE LAW UP-TO-DATE.

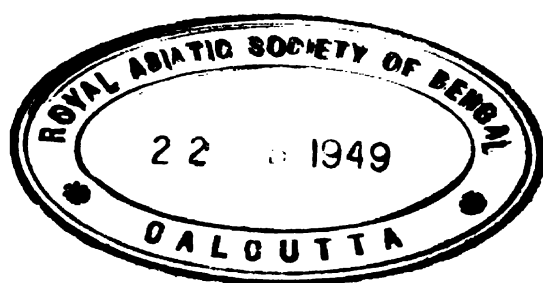
[Abridged Supplementary Edition]

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TO
RAI MAHENDRA CHANDRA SEN BAHADUR,
VIDYARATNA, SAHITYARANJAN, (ADVOCATE, HIGH COURT),
GOVERNMENT PLEADER, KHULNA

THIS BOOK

IS

MOST RESPECTFULLY DEDICATED

By His

Most Affectionate and Obedient Brother.

PREFACE.

This edition, though a Supplement to the last (*Seventh*) edition of this book, is all the same practically an independent edition complete in itself, and contains the text of the whole Act incorporating all the amendments up to the Amending Act VI of 1938, and the entire case law up to date since the last edition with commentaries on the recent amendments.

The Amending Act VI of 1938 came into operation on the 18th August, 1938, on which date the Act was first published in the Calcutta Gazette, excepting the new provisions relating to sec. 3, cl. (5) (definition of 'holding') sec. 26G (limitation on mortgage by occupancy *raiya*t), sec. 47A (application of Chapter VII to all under-*raiya*ts) and sec. 75A (suspension of provisions relating to enhancement of rent), which have been made retrospective in operation.

There have been far-reaching and rather drastic changes in the law by the Amending Act of 1938, the most important of which being the abolition of the landlords' transfer fee and their right of pre-emption. The *Revenue Minister* in moving for the abolition of the landlord's transfer fee and the right of pre-emption said that the object was "not to deprive the landlord of his valuable rights in land or to challenge his rights of ownership, but simply to give financial relief to the agriculturists to some extent." The motion was strongly opposed and criticised as being an expropriatory measure depriving the vested rights of the landlords without any provision for compensation. The *Revenue Minister* in the course of the discussion said "it is difficult to deny that these proposals can not (?) be interpreted as involving the principle of expropriation of the landlords' rights. Personally I would have preferred a compromise on the basis of reduction in the rate of landlord's transfer fee, instead of its total abolition as a golden mean giving financial relief to the *raiya*t. (See Extracts from the Proceedings of the Legislature at pp. 8, 9, 77, 88 and Appendix XI at the end of the book.)

The changes effected by the Amending Act of 1938 have been shown in *italics* in the body of the sections, and in cases where *new* sections have been substituted for the old sections both the sections have been printed in parallel columns under the headings "*Old*" and "*New*", The *repealed* sections have also been printed as they may have to be referred to for sometime to come.

The principal changes effected by the Amending Act VI of 1938 are the following :—

- (1) Landlords' transfer fees and their right to pre-emption have been abolished. Right of pre-emption has been given to co-sharer tenants of occupancy holdings. (*Secs. 26D, 26E and 26F have been repealed and new Sec. 26F has been substituted for old Sec. 26F.*) Right of appeal has been given from an order made in pre-emption proceeding under *new sec. 26F*.
- (2) All the provisions of the Act relating to enhancement of rent have been suspended for a period of 10 years with effect from the 27th of August, 1937. (*New sec. 75A*).
- (3) Tenants have been given the right to get immediate possession of diluviated lands of tenures or holdings on their re-appearance within 20 years of the date of diluvion and in such a case the landlords would get not more than 4 years' rent. Diluvion has been expressly made a ground for abatement of rent. (*New sec. 86A*).
- (4) Tenure-holders have been given the right to surrender their tenures. (*New sec. 85A*). All classes of under-*raiya*ts have been given the right to surrender their holdings. (*Sec. 86 has been amended.*)
- (5) Chapter XIII A which allowed to landlords the use, on certain conditions, of the certificate procedure for realising their rents has been *repealed*.
- (6) Under-*raiya*ts with right of occupancy have now the same right of transfer as occupancy-*raiya*ts. (*Secs. 48F and 48G have been amended.*)
- (7) Under-*raiya*ti leases can now be created for an unlimited period. (*Sec. 48H has been repealed.*)
- (8) The provisions of Chapter VII applicable to under-*raiya*ts have been given retrospective operation. (*New Sec. 47A*).
- (9) All usufructuary mortgages on occupancy holdings subsisting on or after the 1st August, 1937, entered into before the commencement of the Amending Act of 1928, shall be deemed to have taken effect as complete usufructuary mortgages for a period not exceeding 15 years and such mortgages shall be extinguished on the expiry of the said period. Greater facilities have been given to occupancy-*raiya*ts to regain possession, under certain conditions, of mortgaged holdings. (*Sec. 26G has been amended*).

- (10) Increased facilities for the sub-division of tenures or holdings have been given. Division of tenancy or distribution of rent may be made now up to Rs. 2/- in the case of tenures or Re. 1/- in the case of holdings. An order under sec. 88 is now appealable. (*Sec. 88 has been amended*).
- (11) Rate of interest on arrears of rent has been reduced from $12\frac{1}{2}\%$ to $6\frac{1}{4}\%$ per annum. Sec. 67 now applies also to interest on arrears of *Putni* rent. (*Secs. 67 and 195 have been amended*).
- (12) Realisation of *abwab* by the landlord or his agent has been made punishable with fine. An appeal lies to the District Judge against an order imposing a fine and the order of the District Judge on such appeal shall be final. (*New sec. 74A.*)
- (13) Landlords have been given the right to institute suits for portions of arrears of rent instead of for the whole amount. Landlords cannot bring another rent suit *until after 9 months* from the date of the institution of the previous suit. (*Sec. 147 has been amended*).
- (14) The definition of 'holding' has been given retrospective effect and now applies also to holdings created *before* the Amending Act IV of 1928. (*Sec. 3, cl. (5) has been amended*).
- (15) (a) Service of *special* summons shall now ordinarily be effected by registered post with acknowledgment due.
 (b) Rent decree cannot be executed until the expiry of 60 days from the date of the decree.
 (c) No interest is to be paid from the date of the decree if the decretal amount be paid in full within 60 days from the date of the decree.
 (d) Provision for deposit of half the decretal amount in the case of applications setting aside *ex parte* rent decree under sub-clause (ii) of clause (k) has been omitted. (*Sec. 148 has been amended*).

Extracts from the Proceedings of the Legislature have been incorporated in the book under the respective sections for a clear understanding of the object and effect of the changes. Commentaries on the effect of the Bengal Tenancy Ordinance of 1938 and the amendment by Act VI of 1938 on the question of payment of landlord's transfer fees and the object and effect of the said Ordinance will be found at pp. 6—9. The text of the said Ordinance and the

Governor's Message to the Legislature will be found at pp. 2--4. Commentaries on the effect of the amendment of sec. 26F and repeal of sec. 26J on the question of the right to pre-empt and recover landlords' transfer fees and compensation in respect of transfers of occupancy holdings the documents of which were executed and registered before the Act VI of 1938 came into operation will be found at pages 89 and 103. There is a *conflict of case law* on the question as to whether an assignee of a rent decree without a transfer of the landlord's interest can execute it even as a *money* decree. Commentaries on this question will be found under sec. 148(o) at pp. 251-252.

Twelve Appendices at the end of this book contain, besides the Statement of Objects and Reasons for the Bengal Tenancy (Amendment) Bill, 1937, Report of the Select Committee of the Bengal Legislative Council on that Bill, and the Bengal Government Notification prescribing a *new form 13A* regarding the concise statement for order of attachment and proclamation of sale of tenure or holding under sec. 163 of this Act, the Proposed amendments in the Bengal Government Rules, Bengal Government Press Note regarding deposit of landlords' transfer fees, the Bengal Tenancy (*Second Amendment*) Bill, 1938, for amendment of sec. 68, the Bengal Tenancy (*Third Amendment*) Bill, 1938, for amendment of sec. 52, the Bengal Rates of Interest Bill, 1938, Extracts from the Assembly Proceedings and Council Debates on the Bengal Tenancy (Amendment) Bill, 1937, and the Terms of Reference to the Bengal Land Revenue Commission, 1938, which, it is hoped, will be found useful.

The amendments effected by the Government of India (Adaptation of Indian Laws) Order, 1937, have been indicated in the footnotes under the respective sections.

A Statement of Repeals, Amendments, etc., on the next page will show at a glance the changes effected by the Amending Act VI of 1938.

I am thankful to Babus Sures Chandra Sen, Advocate, Shovendra Chandra Sen, B.L., Anilendra Chandra Sen, M.A., B.L., Lokendra Chandra Sen, B.L., and Jashendra Chandra Sen for their assistance in the revision of the proofs and the preparation of the Index and the Table of Cases. I should also express my thanks to the Sri Gouranga Press for the despatch in printing the work.

59/3, Harrison Road,
CALCUTTA,
18th November, 1938. }

HEMENDRA CHANDRA SEN.

STATEMENT OF REPEALS, AMENDMENTS, ETC.

REPEALED, IN PART AND AMENDED	...	...	{	Ben. Act I of 1907.
				E. B. & A. Act I of 1908.
				Act XXXVIII of 1920.
				Ben. Act IV of 1928.
				Ben. Act II of 1930.
				Ben. Act VI of 1938.*
AMENDED	...	...	{	Act VIII of 1886.
				Ben. Act III of 1898.
				Ben. Act I of 1903.
				Ben. Act III of 1913.
				Ben. Act II of 1918.
				Ben. Act III of 1919.
				Ben. Act X of 1923.
				Ben. Act I of 1925.
SUPPLEMENTED	...	...	...	Ben. Act III of 1895,
				ss. 20, 28 to 32, 36(c).

* Ben. Act VI of 1938 :

(1) Amendment	...	...	Ss. 3 (5), 26G, 48A, 48B, 48E, 48F, 48G, 49A, 49D, 54, 67, 86, 98, 99A, 110, 146A, 147, 148, 153, 178, 180, 180A, 188, 189 and 195.
(2) Repeal	Ss. 26A, 26D, 26E, 26H, 26I, 26J, 48H and Chap. XIII A.
(3) Substitution	Ss. 26C, 26F, 86A and 88.
(4) Insertion (New)	Ss. 47A, 74A, 75A and 85A.

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THE BENGAL TENANCY ACT

BEING

ACT VIII OF 1885.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor-General on
the 14th March 1885).*

[AS MODIFIED BY SUBSEQUENT ENACTMENTS
UP TO ACT VI OF 1938.]*

An Act to amend and consolidate certain enactments relating to the law of Landlord and Tenant within the territories under the administration of the Lieutenant-Governor of Bengal.

Whereas it is expedient to amend and consolidate certain enactments relating to the Law of Landlord and Tenant within the territories under the administration of the Lieutenant-Governor of Bengal; it is hereby enacted as follows :

Headings of Notes.

1. HISTORY OF THE INTRODUCTION OF THE B. T. (AMENDMENT) ACT VI OF 1938.
2. COMMENCEMENT : ACT VI OF 1938.
3. BENGAL TENANCY ORDINANCE NO. 1 OF 1938.
4. OBJECT OF THE BENGAL TENANCY (AMENDMENT) ACT VI OF 1938.
5. INTERPRETATION OF STATUTES.
6. RETROSPECTIVITY : PENDING SUIT AND PROCEEDINGS.
7. LANDLORD AND TENANT.
8. AGRICULTURAL AND NON-AGRICULTURAL LEASES.

* [For Statement of Objects & Reasons, see *Calcutta Gazette, Extraordinary*, August 27, 1937, at page 234; for Bengal Tenancy (Amendment) Bill of 1937, see *Ibid* pp. 223 to 233; for Proceedings in the Bengal Legislative Assembly, see *Assembly Proceedings* Vol. 51, No. 4 (Second Session, 1937) dated 10th, 11th, 13th, 14th, 20th to 25th, 27th to 30th September, 1937, Vol. 52, No. 6 (Third Session, 1938) dated 7th April, 1938; for Report of

History of the introduction of B. T. (Amendment) Act VI of 1938.

I. History of the Introduction of the B. T. (Amendment) Act VI of 1938 :—The Bengal Tenancy (Amendment) Bill of 1937 (which has been passed as B. T. (Amendment) Act VI of 1938) was introduced in the Bengal Legislative Assembly on the 10th September, 1937. It was passed by the Assembly on the 30th September, 1937, and by the Bengal Legislative Council (as B. T. Amendment Bill of 1938) on the 1st April, 1938, with certain amendments.

The Bill as amended by the Council was passed by the Assembly on the 7th April, 1938. His Excellency the Governor returned the Bill on the 29th July, 1938, to the Legislature in pursuance of the provisions of the proviso to Sec. 75* of the Government of India Act, 1935, recommending to the Bengal Legislative Chambers that they do amend the Bengal Tenancy Amendment Bill, 1938 by the adoption, without further amendments, of the two following amendments, that is to say,—

- (1) *That sub-clause (2)† of cl. (i) of the Bill be omitted.*
- (2) *That in §cl. (21) of the Bill the words, figure and brackets “(including Sec. 52)” wherever they occur be omitted.*

The Governor's message§ was read before the Assembly by the Speaker on the same date, and the Bill, with the above amendments

the Select Committee of the Bengal Legislative Council, see *Calcutta Gazette*, Part IVB, 17th March, 1938, pp. 47–78; for Report of the Select Committee of the Bengal Legislative Council to which the Bengal Tenancy (Amendment) Bill was recommitted, see *Calcutta Gazette*, Part IVB, 31st March, 1938, pp. 79–98; for Proceedings in the Bengal Legislative Council, see Council Debates, Vol. I, Nos. 1, 7 to 9, 25 to 31, dated 24th January, 8th, 9th, 14th February, 11th, 25th to 31st March, and 1st April, 1938; for Bengal Tenancy Ordinance, 1938, see *Calcutta Gazette*, Extraordinary, dated the 3rd June, 1938.]

Govt. of India Act 1935, Sec. 75

* Section 75 of the Government of India Act, 1935, runs as follows:—

“A Bill which has been passed by the Provincial Legislature or, in the case of a Province having a Legislative Council, has been passed by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor in his discretion shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General :

Provided that the Governor may in his discretion return the Bill together with a message requesting that the Chamber or Chambers will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Chamber or Chambers shall consider it accordingly”.

† Sub-clause (2) of Cl. (1) of the Bill ran as follows :—

(2) It shall come into force on such date, not later than the 31st May, 1938, as the Provincial Government may, by notification in the *Official Gazette*, appoint.

‡ Clause (21) of the Bill refers to new Section 75A regarding the suspension of the provisions relating to enhancement of rent. In sub-section (1) and sub-section 2(a) of Sec. 75A the words “(including Sec. 52)” occurred in the Bengal Tenancy Amendment Bill of 1938.

Governor's Message.

§ The Governor's Message to the Chambers of the Bengal Legislature under section 75 of the Government of India Act, 1935 is as follows :—

“The Bengal Tenancy Amendment Bill, 1938 has been passed by both Chambers of the Bengal Legislature and has been presented to the Governor in accordance with Sec. 75 of the Government of India Act, 1935. Having given my most careful attention to the Bill, I am of opinion that it is my

as recommended by the Governor was passed by the Assembly on the 3rd August, 1938. The Governor's message was read before the Council by the President on the 8th August, 1938, and the Bill, as passed by the Assembly with the amendments as recommended by the Governor, was passed by the Council on the 12th August, 1938. The Bengal Tenancy (Amendment) Act VI of 1938 as passed by the Bengal Legislature having received the Governor's assent was first published in the Calcutta Gazette on the 18th of August, 1938, and came into force from that date.

Note:—There were motions in the Assembly for the circulation of the Bill for eliciting public opinion and also for reference to a Select Committee, but these motions were lost. In the Council there was also a motion for circulation of the Bill, which was lost. In the Council there was a motion for reference to a Select Committee, which was agreed to on 14-2-1938. The Select Committee appointed by the Council submitted their Report recommending certain amendments (For *Select Committee's Report*, see *Appendix at the end of the book*), which was published in the Calcutta Gazette of the 17th March, 1938. The Select Committee, not having mentioned in their report whether republication of the Bill was necessary or not the Bill was recommitteed to the said Select Committee by a motion in the Council on

Motions for circulation of the Bill and for reference to Select Committee.

duty to return it to the Legislature in accordance with the proviso to the said section and to request the Chambers to consider it in regard to the following points.

Governor's Message.

2. Sub-clause (2) of clause 1 of the Bill is to the effect that "it shall come into force on such date, not later than the 31st May, 1938, as the Provincial Government may, by notification in the Official Gazette, appoint." Apart from the fact that the latest date thus provided for in the Bill has already passed, I am advised that a Notification, bringing the Bill into force with retrospective effect from the 31st May, 1938, or any other date would give rise to complicated problems of law, invite unnecessary litigation and result in much avoidable confusion, for example, as to the respective rights of transferor and transferee under the revised sec. 26C. The difficulty will be met by omitting the existing commencement clause and allowing sec. 6 of the Bengal General Clauses Act, 1899, to operate under which the Act will come into force on the date on which the assent thereto is first published in the Official Gazette. The Bengal Tenancy Ordinance ensures meanwhile that the registration of transfers, with consequent payment of landlord's fees, is held in abeyance so that the persons concerned shall obtain the benefit of the new law if and when it is passed.

3. Secondly, the new sec. 75A, which is inserted in the Bengal Tenancy Act, 1885, by clause 21 of the Bill purports to be concerned with the "Suspension of provisions relating to enhancement of rent" and provides for the suspension, for a period stated, "of all the provisions of this Act (including sec. 52) relating to enhancement of rent." The inclusion of a reference to sec. 52 would imply that that section relates to enhancement of rent. This however is not the case, since sec. 52 relates, not to enhancement in the rate of rent, but to alteration of rent in respect of alteration of area and provides for the liability of a tenant in certain conditions to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, as well as for reduction of rent on proof of reduction of area. The principle embodied in sec. 52 of the Bengal Tenancy Act, 1885, is also the underlying principle of sec. IV of Regulation XI of 1825, whereby Government are entitled to receive additional revenue, and landlords to realise additional rent, in cases of accretions to estates and tenures. This is a fundamental and accepted principle of land revenue assessment and has no relation to enhancement of the rate of rent. Reference therefore to sec. 52 in a section such as the proposed sec. 75A, which is concerned with the enhancement of the rate of rent, is inappropriate and illogical, and just as the inclusion of such reference could add nothing to the effect of the Bill, so its omission can detract in no way from it. Be that as it may, my Government are aware that sec. 52 is liable to abuse and they intend to take necessary steps to amend its provisions at an early date by separate legislation.

4. After due consideration, therefore, I have decided to recommend to the Bengal Legislative Chambers that the Bill be amended by the omission

*Motion for
reference to
Select
Committee.*

25-3-38 in order that they might comply fully with the requirements of sub-section (3) of sec. 61 of the Bengal Legislative Council Rules and Standing Orders and submit their report on the next day, i.e., 26-3-38. The Select Committee resubmitted their report on 26-3-38, which was published in the Calcutta Gazette of the 31st March, 1938.

For discussions in the Assembly and in the Council on the Bengal Tenancy (Amendment) Bill, 1937, see *Extracts from the Assembly Proceedings and Council Debates, printed in the Appendix at the end of this book.*

*B. T.
(Amend-
ment)
Act VI of
1938.*

2. Commencement:—Act VI of 1938:—The Bengal Tenancy (Amendment) Act VI of 1938, having been assented to by the Governor under Section 75 of the Government of India Act, 1935, was first published in the *Calcutta Gazette*, dated the 18th of August, 1938, Part III, pages 13 to 25.

[*Sec.:*—Notification No. 805L, dated the 17th August, 1938—the following Act of the Bengal Legislature, having been assented to in His Majesty's name by the Governor, is hereby published for general information:—]

*Commence-
ment from
the 18th
August,
1938.*

The provisions of the B. T. (Amendment) Act VI of 1938, except those which have been made retrospective in operation by that Act, came into force on the 18th of August, 1938, on which date the Act, having received the Governor's assent, was first published in the *Calcutta Gazette*. See, in this connection, sections 6 and 7 of the Bengal General Clauses Act.*

*Provisions
which have
been made
retrospec-
tive in
operation by
Act VI of
1938.*

The new provisions relating to Sec. 3, cl. (5) (definition of holding), Sec. 26-G (limitation on mortgage by occupancy raiyat), new Section 47A (application of Chap. VII to all under-raiyats), and new Section 75A (suspension of Provisions relating to enhancement of rent) have been made retrospective in operation by the Amending Act VI of 1938.

Amendment in the Legislature:—In the Bengal Tenancy (Amendment) Bill of 1937 there was a sub-section (2) to cl. (1) of the Bill and it ran as follows:—

“(2) It shall come into force on such date as the Provincial Government may, by notification in the official Gazette, appoint.”

*Amendment
in the
Legislature.*

An amendment was at first moved in the Assembly to add the following words after the word “appoint” in the last line:—“but not later than the 1st January, 1938.” The Revenue Minister, in charge of the Bill, suggested to modify the amendment and substitute the words, “31st March, 1938” for the words “1st January, 1938.”—The mover of the amendment accepted the suggestion and moved for the addition of the words, “but not later than the 31st of March, 1938.” The motion was agreed to and passed by the Assembly. The Select Committee of the Bengal Legislative Council, which was appointed to consider the Bill, recommended the substitution of the words “not later than one month after it receives assent”, for the words, “but not later than the 31st of March, 1938.” There was an amendment in the Council and the following words—“not later than the 31st of May, 1938,” was substituted and this amendment was also agreed to by the Assembly,

*Governor's
Message.*

of sub-clause (2) of clause 1 and by the omission of all references to sec. 52 of the Bengal Tenancy Act, 1885, in clause 21 of the Bengal Tenancy Amendment Bill, 1938, and I appoint the Hon'ble Sir Bijoy Prasad Singh Roy Minister in charge of Revenue Department, to be the Member in charge of the Bill.”

*Bengal
General
Clauses Act.*

* *Sec. 6 of the Bengal General Clauses Act (I of 1899) provides:—*“(1) Where any Bengal Act is not expressed to come into operation on a particular day then it shall come into operation on the day on which it is first published in the Calcutta Gazette after having received the assent of the Governor-General.” “(2) Unless the contrary is expressed, a Bengal Act shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.”

Sec. 7 of the Bengal General Clauses Act provides:—“In this Act, and in every Bengal Act made after the commencement of this Act, the date of such publication as is mentioned in sec. 6, sub-sec. (1) shall be pointed above the title of the Act, and shall form a part of the Act”.

and sub-sec. (2) to cl. (1) of the Bill as passed by the Legislature ran as follows :—

"(2) It shall come into force on such date, *not later than the 31st May, 1938*, as the Provincial Government may, by notification in the official Gazette, appoint."

The Governor in his message* to the Legislature under sec. 75 of the Government of India Act, 1935, recommended for the deletion of sub-clause (2) of cl. (1) of the Bill. The Legislature agreed to the Governor's recommendation and sub-clause (2) of cl. (1) of the Bill was omitted.]

3. Bengal Tenancy Ordinance No. 1, 1938† :—This Ordinance was published in the *Calcutta Gazette, Extraordinary* of the 3rd June, 1938, under sub-section (1) of Sec. 88‡ of the Government of India Act, 1935.

* For Governor's message, see ante, notes under heading No. 1.

† **The Bengal Tenancy Ordinance, 1938** [published in the *Calcutta Gazette, Extraordinary*, of the 3rd June, 1938] is as follows :—

**Bengal
Tenancy
Ordinance,
1938.**

Whereas the Legislature of the Province is not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action;

And Whereas the instructions of the Governor-General under sub-section (1) of Section 88 of the Government of India Act, 1935, have been obtained :

The Governor is pleased to make and promulgate the following Ordinance, namely :—

1. (1) This Ordinance may be called the Bengal Tenancy Ordinance, 1938.

(2) It shall be deemed to have come into force on the 31st May, 1938.

2. Notwithstanding anything contained in any other law, the period during which this Ordinance remains in force shall not, in relation to the registration of instruments of transfer to which the provisions of sub-section (2) of section 26C of the Bengal Tenancy Act, 1885 (hereinafter referred to as the said Act) apply, be taken into consideration in computing any period prescribed by or under any law within which a document shall be presented for registration.

3. Notwithstanding anything contained in any other law, during the period during which this Ordinance remains in force—

(a) a Court shall not, on the ground of the failure to deposit the landlord's transfer fee and the prescribed cost of transmission thereof, dismiss an application for probate or letters of administration to which the provisions of sub-section (4) of Section 26C of the said Act apply;

(b) a Court or Revenue-Officer shall not, in a matter to which the provisions of Section 26B of the said Act apply, make an order under sub-section (3) of the said section.

‡ **Sec. 88 of the Government of India Act, 1935**, runs as follows :—

**Sec. 88,
Govt. of
India Act.**

(1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :

Provided that the Governor—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; and

(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance—

(a) shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the re-assembly of

Ordinance
expired on
8th September,
1938.

(1) **Legal effect of the Ordinance** :—Under sub-section (2) of sec. 88 of that Act, this Ordinance had the same force and effect of an Act of the Provincial Legislature assented to by the Governor, and under cl. (a) of that sub-section it ceased to operate at the expiration of six weeks from the re-assembly of the Legislature. There was no Resolution of the Legislature disapproving the Ordinance. The Legislature re-assembled on the 29th of July, 1938, and under cl. (a) of sub-section (2) of Sec. 88 of the said Act the Ordinance expired on the 8th September, 1938.

In the B. T. (Amendment) Bill, 1938, as passed by the Legislature on the 7th April, 1938, there was a provision that the Act, when passed, "shall come into force on such date, *not later than the 31st May, 1938*, as the Provincial Government may, by notification in the Official Gazette, appoint." The Bill, thus passed, was presented to the Governor for assent. The said Bill provided for abolition of landlords' transfer fees and their right of pre-emption with effect from the 31st May, 1938. There was delay in giving the Governor's assent, and the Provincial Legislature, being then not in session, the Governor promulgated the above Ordinance on the 3rd June, 1938, coming into force from the 31st May, 1938, under sub-sec. (2) of sec. 1 of the said Ordinance. The Ordinance provided that the period from the 31st May, 1938, till the date of the expiry of the Ordinance, was to be excluded in computing the time prescribed by law within which any document of transfer in relation to the provisions of sec. 26C (2) of the B. T. Act shall be presented for registration. The Ordinance further stayed the power of Courts to dismiss applications for probate or letters of administration under sec. 26C (4) or make an order under sec. 26E (3) in the case of sale in execution of decree, certificate or foreclosure of mortgage, for non-payment of landlord's transfer fees.

(2) **Object of the Ordinance** :—The Object of the Ordinance appears to be that the provisions relating to the landlord's transfer fees and the right of pre-emption which have been abolished by the Bengal Tenancy (Amendment) Bill, 1938, might come into effect, when passed into law, from the 31st of May, 1938, according to sub-sec. 2 of clause 1 of the said Bill. Under sec. 23 of the Indian Registration Act (XVI of 1908) the time for presenting for registration of a document is 4 months from the date of execution and the object of Sec. 2 of the Ordinance appears to be to extend the time for presentation of instruments of transfer for registration from the 31st May, 1938, till the expiry of the Ordinance.

(3) **Effect of the Ordinance and amendment by Act. VI of 1938 on the question of payment of Landlord's transfer fees** :—In the B. T. Amendment Act (VI of 1938) the provision that

Sec. 88,
Govt. of
India Act.

the Legislature, or if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council;

(b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Provincial Legislature assented to by the Governor; and

(c) may be withdrawn at any time by the Governor.

(3) If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.

the said Act shall come into force from the 31st May, 1938, was omitted and therefore the provisions of the said Act excepting those which have been made retrospective came into force from the 18th August, 1938. The question which arises for consideration in relation to the effect of the Ordinance and the amendment of the law is whether landlord's transfer fee would be required (1) in the case of transfer by private sales the documents of which were executed before or after the 31st May, but were not presented for registration till the 18th August, 1938, and (2) in the case of Court sales under sec. 26E in execution of decree, certificate or foreclosure of mortgage which took place before or after the 31st May, 1938 and which are pending for confirmation after the said Act came into force.

Effect of Ordinance and amendment on the question of payment of landlord's transfer fee.

As sub-sec. (2) of cl. 1 of the Bill providing that the Act when passed would come into force from the 31st May, 1938 had been omitted from the Act it cannot be said that the Act in regard to the provisions of sec. 26C and repeal of sec. 26E have been made retrospective with effect from the 31st May, 1938, by virtue of the Ordinance inasmuch as the effect of the Ordinance, it appears, was only to keep those provisions in abeyance and not to abolish the same.

A transfer operates from the date of the execution of a document under Sec. 47 of the Indian Registration Act (XVI of 1908), and title in execution sale, which is not a rent sale, accrues from the date of the sale. Now, the question is whether the right to landlord's transfer fee accrues from the date of execution of the document of transfer and from the date of the execution sale. If such right to landlord's transfer fee be taken to accrue from the date of the execution of the document and the date of the execution sale on the ground that the sale brings into existence the obligation to pay the landlord's transfer fee and the landlord's right to recover it, then the legal position would be that the vested rights so acquired cannot be affected by the new provisions of the Act which have not been made retrospective and as such in both the cases landlord's transfer fee would have to be paid, and it appears that the landlord in such cases would be entitled to seek his remedy in Civil Court for recovery of the landlord's transfer fee. It appears, however, that in the present case the term 'retrospective operation' is not appropriate and the question for determination is not one of retrospective operation but a question of what the law is about the landlord's transfer fee under the Amending Act VI of 1938. In the case of documents of transfer which were executed before or after the 31st May, 1938, and which are presented for registration after the Amending Act VI of 1938 came into force, i.e., on or after the 18th August, 1938, the registering officer cannot demand landlord's transfer fee because after the said Act came into operation there is no law providing for payment of landlord's transfer fee. Landlord's transfer fee was payable *not at the time of execution of a document of transfer but at the time of its presentation for registration* and as such a registering officer after the Amending Act VI of 1938 came into force cannot refuse registration of the document for non-payment of landlord's transfer fee though such document was executed before the Amending Act. Similarly in the case of Court sale, landlord's transfer fee was payable *not at the time of the sale but at the time of confirming the sale*, and the Court cannot refuse to confirm the sale after the new Act came into force for non-payment of landlord's transfer

fee though such sales might have taken place before or after the 31st May, 1938. The law, at the time when a document of transfer is now presented for registration, or when a sale comes up for confirmation, is that no landlord's transfer fee is required in either case.

The Ordinance, does not, it appears, touch this question excepting that, by virtue of the provisions of the same, the law as to payment of landlord's transfer fees was suspended from the 31st May, 1938, till the Amending Act VI of 1938 came into force on the 18th August, 1938, and that the time for presenting documents of transfer which would be time barred but for its provisions was extended up to the 8th September, 1938.

Conclusion. **The legal position, therefore, appears to be this:—**

(1) *Landlord's transfer fees would not be required in the case of documents of transfer which were executed before the 31st May, 1938, but not time barred by virtue of the Ordinance and which are presented for registration after the Amending Act VI of 1938 came into force.*

(2) *Landlord's transfer fees would not be required in the case of execution sales which took place before or after the 31st May, 1938, and which come up for confirmation after the said Act came into force. See also notes under secs. 26C and 26E.*

(4) **Interpretation of Ordinance:—**The rules of interpretation applicable in the case of an Act of the Legislature are equally applicable in the case of an Ordinance: *Brojendranath Gupta v. Emperor*, 35 C.W.N. 436. See notes under the heading no. 5 "Interpretation of statutes."

[The Bengal Government issued a Press note on the 4th September, 1938 on the legal position regarding the deposit of landlord's transfer fees in the light of the Ordinance and the amendment of the law. See the Press Note printed in the Appendix at the end of this book.]

4. Object of the Bengal Tenancy (Amendment) Act VI of 1938:—The object of the amendment as stated in the Statement of Objects and Reasons for the Bill, is as follows:—

*Statement
of Objects
and
Reasons.*

"Some of the existing provisions of the Bengal Tenancy Act have been found to operate rather harshly on the cultivators. The object of this Bill is not to attempt a radical reform of the existing system of land tenure, but to lessen the burden on the cultivators by making the amendments to the law which appear to be most urgently required."

*Assembly
Proceedings,
Vol. 51,
No. 4 dated
10th Sept.
1937.*

The Revenue Minister in introducing the Bill, said: "The Object of the Bill is to amend some of the existing provisions of the Bengal Tenancy Act which have been found to operate rather harshly on the cultivators for the purpose of giving immediate relief to them. The Bill does not attempt to bring about a radical reform in the existing system of land tenure by comprehensive amendment of the Act. The solution of the bigger issues must be postponed till the proposed Commission of Enquiry submits its report. Among the important provisions of the Bill are to be found those for the abolition of landlord's transfer fee and the right of pre-emption. Personally I would have preferred a compromise on the basis of reduction in the rate of landlord's transfer fee, instead of its total abolition, as a golden mean giving financial relief to the *raiyat*, but as far as it could be informally

ascertained, this proposal did not find favour with the majority of the tenant's representatives. The proposal entails a large sacrifice on the part of the landlords, because they would be deprived annually of something between 30 to 35 lacs even in the present market. It is difficult to deny that these proposals cannot be interpreted as involving the principle of expropriation of the landlord's right and as such are against my personal views. These proposals, however, have been included in the Bill by the Government in the hope that in view of the insistent demand by the tenants, representatives for the abolition of the transfer fee and pre-emption, the landlords may find it expedient to agree to them in the interest of better feeling between themselves and the raiyats".

5. Interpretation of Statutes :—When any particular case comes before the Courts whether civil or criminal, in which the rights and liabilities of any party are effected by any legislation of an Indian Legislature, the Courts may have to determine with a view to the particular case whether such legislation was or was not within the legal powers of the Council. The Courts however cannot declare invalid, annul or make void a law so passed, but if it is found *ultra vires* or unconstitutional they will refuse to give effect to it and treat it as void or invalid or having no legal existence: *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, 64 C.L.J. 212.

Enactment,
if *ultra vires*:
Courts' powers.

Considerations derived from the previous state of the law should not generally influence Courts in the matter of interpretation of a particular provision of law and starting with an enquiry how the law stood previously would not be justifiable in all cases; but if the meaning of the statutory provision is doubtful, resort may be had to the previous state of the law, for the purpose of aiding the construction of the same; *Bhusan Chandra Samanta v. Secretary of State for India*, 40 C.W.N. 1034.

Previous state of the law when may be looked into.

The true meaning, the exact scope and significance of any passage occurring in a statute may be found not merely in the words of that passage but on a comparison of the same with other parts of the statute and the intention of the Legislature ascertained in that way: *Aghore Chandra Jalui v. Rajnandini Debi*, 60 Cal. 289: 36 C.W.N. 924: 58 C.L.J. 484.

Every Act must be construed according to the plain meaning of its terms and if the plain meaning is clear, the Court must take that plain meaning without reference to the previous law on the subject or the proceedings of the Select Committee: *Corporation of Calcutta v. The Monarch Bioscope Company*, 63 C.L.J. 1.

To interpret the words of an Ordinance is a function reserved for the Courts which are established for that purpose; any exposition which may be proposed by the Executive Government of a Province has the weight which must always belong to the considered opinion of enlightened experience, but it cannot be quoted or received as an authority by a Court of law: *Jethmal Paisram v. Emperor*, 139 I.C. 777.

Ordinance:
Rules of interpretation.

The rules of interpretation applicable in the case of an Act of the legislature are equally applicable to the case of an Ordinance. The plain language of the ordinance should be given effect to: *Brojendra Nath Gupta v. Emperor*, 35 C.W.N. 436.

Statutes taking away or impairing vested rights not retrospective in operation but alterations in procedure are retrospective.

6. Retrospectivity: Pending Suit and Proceedings :—A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only: *Jiban Krishna Chakrabarty v. Abdul Kader Chowdhury*, 60 Cal. 1037: 37 C.W.N. 689 at p. 692: 57 C.L.J. 477.

A statute which affects only the procedure would apply to pending actions, but a statute which creates a right of action or takes away one has no retrospective effect. - It is a general rule that where the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in expressed terms they apply to pending actions, do not affect them : *Jagomohan Ghose v. Behari Barui*, 39 C.W.N. 1006 at p. 1009.

Parties to be governed by the law as it stands at the date of the institution of the suit.

Where a suit is instituted after an amended Act comes into force the parties are to be governed by the law as it stands at the date of the institution of the suit, but if a party moves before an amendment comes into force, then the law, as it stood before the amendment, would apply. In pending actions or if a party had taken a step provided by the law to enforce his right there cannot be any doubt that the amended Act should not apply. The parties are to be governed by the law as it stands at the date of institution of suit. A right to an appeal in a pending action is not affected by any alteration in the right of appeal while the action is pending : *Uday Chandra Chakravarty v. Ambica Charan Chakravarty*, 64 C.L.J. 547: A.I.R. 1937 Cal. 455: 170 I.C. 259. See also *Hingal Kumari Dasi v. Satis Chandra Pal*, 41 C.W.N. 737.

Right to appeal, not a matter of procedure.

Statute dealing with substantive rights not retrospective in operation.

A retrospective operation ought not to be given to a statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language. An enactment may be made retrospective by necessary intendment. A statute dealing with substantive rights would not ordinarily be construed as retrospective, but may operate as such only on facts coming into existence after the passing of the statute.

Intention of the Legislature.

In construing the intention of the legislature regarding an Act, the whole Act must be looked into in the light of the state of law at the time it was passed, unless a contrary intention can be gathered from express words or by necessary implication. But the language of the Act is not to be strained unduly by attempting to bring it in with the supposed intention of the legislature: *Mahammad Hosain v. Jamini Nath Bhattacharyya*, [1938] 1 Cal. 607.

No statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction: *Kanak Kanti Roy v. Kripa Nath Gain*, 58 Cal. 817: 35 C.W.N. 125: 52 C.L.J. 597.

Retrospective effect on pending causes, when express provision in the statute.

Where a statute provided that certain circumstances, affecting vested rights, shall be deemed to have existed in respect of transactions prior to a certain date, *held*, that the provision applied to all transactions of the kind specified, including those which were in question in a pending suit at the date the provision came into force: *K. C. Mukerjee v. Musammat Ram Ratan Kuer*, 63 I.A. 47: 40 C.W.N. 263 (P.C.): 62 C.L.J. 419 (P.C.).

Retrospectivity is never presumed and a law is regarded as retrospective only when it is so by express enactment or it is a necessary implication from the language employed by the legislature, the presumption always being against the taking of vested rights: *Kumar Punyendra Narain Deb v. Kumar Jogendra Narain Deb*, 64 C.L.J. 212.

The law as it existed at the date when an action was commenced must decide the rights of the parties in the suit, unless the legislature expresses a clear intention to vary the relation of litigant parties to each other; the words used must appear to the Courts to compel them to give the law an *ex post facto* operation. When the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new Act shows a clear intention to vary such rights: *Ibid*.

Retrospectivity is never presumed in interpreting a statute, and a law is regarded as retrospective only when it is so by express enactment or it is a necessary implication by the language employed by the legislature, the presumption always being against the taking away of vested rights: *Debcendra Narain Roy v. Jogendra Narain Deb*, A.I.R. 1936 Cal. 593.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But the rule has an exception, namely, where the enactments merely affect procedure and do not extend to rights of action. There can be no objection to an enactment relating to procedure having effect immediately although it should affect past transactions and the mode of enforcement of vested rights, provided of course that no injustice is done: *Suprabhal Chandra v. Bhupati Bhusan Mandal*, 40 C.W.N. 773 at p. 776.

The term "retrospective operation" is inappropriate and irrelevant when what is taken away is merely a right which may accrue in due time but which has not in fact accrued on the date when the Act comes into force. Retrospective operation is one matter. Interference with existing rights is another matter. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act is to be understood as retrospective in operation. But when the question is whether a certain provision in it as to the contents of leases is addressed to the case of all leases or only of some, namely leases executed after the passing of the Act, the question is as to the ambit and scope of the Act, and not as to the date from which the new law, as enacted by the Act, is to be taken to have been the law: *Ram Ranbijaya Prasad Singh v. Deoki Ahir*, 15 Pat. 619: A.I.R. 1937 Pat. 180: 167 I.C. 865.

7. Landlord and Tenant:—The relationship of landlord and tenant under the Bengal Tenancy Act is not always governed by a contract, it is also to be governed by status. The English rule that the relationship of landlord and tenant can be established by mutual agreement does not apply to the agricultural lands in this country. If a *raiyyat* is inducted into the land by a trespasser, he is entitled to resist eviction by the real owner provided there had been *bona fides* both on the person inducted and the person inducting. If a settled *raiyyat* of a village takes some land for the purpose of cultivation for a term of years with the express stipulation that

Retrospectivity is never presumed: Presumption is against taking away vested rights.

Alteration of substantive law during pending actions: Rights of parties to be decided according to the law as it existed when the action was begun.

The term "retrospective operation" not appropriate when what is taken away is merely a right which may accrue in due time.

Relationship of landlord and tenant under B. T. Act not always governed by contract but also by status. English rule not applicable.

he would have no right to hold it after the expiration of the term, he does not become a trespasser after the expiration of the term. He acquires occupancy right in the land by virtue of his status as a settled *raiyat* of the village and becomes a tenant on the land: *Dwarik Mandal v. Nalini Kanta Mitra*, I.L.R. [1937] 2 Cal. 689: 175 I.C. 509: A.I.R. 1938 Cal. 223.

Although, strictly speaking, there cannot be a *palni* under a *palni*, it is quite legal and proper on the part of the zemindar to create another tenancy over an existing *palni*, provided the grant does not operate in derogation of the rights of the *patnidar*.

An intermediate tenancy between a zemindar and a *patnidar* may be sold under Regulation VIII of 1819 provided there is a distinct agreement to that effect between the zemindar and the intermediate tenure-holder: *Durga Kanta Majumdar v. Surendra Prasad Lahiri Chaudhuri*, I.L.R. [1937] 1 Cal. 788: 41 C.W.N. 364. See also *Parabi Bibi v. Birendra Nath Sarkar*, 60 Cal. 1082: A.I.R. 1933 Cal. 543.

If a term is granted subject to a condition against assignment, an assignment by the lessee will be void, but if the restraint is by covenant only, the lessee, by assigning, commits a breach of covenant, but the assignment itself is not void, though the landlord can put an end to it as soon as the assignment comes to his knowledge, if the lease contains a power of re-entry: *Sridhar Chandra Roy v. Kusum Kumari Roy*, 42 C.W.N. 832: A.I.R. 1938 Cal. 478. Just as a grantor can withhold from the grantee the power to assign absolutely, so can he make the power to assign subject to a condition and stipulate that any purported assignment which does not fulfil the condition shall not be valid—*Ibid*. Where a *mourashi mokarari patta* contained a clause that in case of a transfer the transferee shall pay a *chouth* or one-fourth of the consideration money as mutation fee and in default of such payment his transfer shall not be valid; *held*, that the clause was not a covenant, but a condition and the transfer in favour of a person, who had not paid the mutation fee was invalid and did not create any title—*Ibid*.

Such a restrictive covenant that a transfer would not be valid if the transferee does not pay as mutation fee to the lessor one fourth of the amount of fair price of the lease-hold is valid and it runs with the land and remains operative during the entire period of the lease. In the case of transfer without payment of the amount stipulated the lessee can treat the purchaser as a trespasser: *Nabjan Sardar v. Naburuli Molla*, 37 C.W.N. 272.

In a rent suit a tenant can plead that the plaintiff is not his landlord, but his landlord is somebody else. But the party in whom the title is set up by the tenant and whose name is not on the record cannot intervene in the suit so as to transform a rent suit into a title suit: *Mahomed Mohsen Ali v. Rai Kshitish Bhushan Roy Bahadur*, 39 C.W.N. 1010: 62 C.L.J. 38.

An assignee by way of sub-demise of a lease-hold property from the lessee is bound by a restrictive covenant of the head lease if he had notice either actual or constructive of the covenant. A lessor granting a lease in perpetuity or for long term, such as 999 years still retains the reversion and if for the benefit of the reversion a covenant is entered into, then, the essential of a restrictive covenant

Inter-mediate tenancy between Zemindari and *Putni* is valid and such inter-mediate tenancy can be sold under Reg. VIII of 1819 if there be agreement to that effect.

Restraint on alienation by covenant and by condition, difference between.

Condition in *mourashi mokarari patta* for payment of *chouth* on transfer, by the transferee to the lessor—Non-payment, effect of.

Rent suit cannot be transformed into a title suit.

Restrictive covenant.

that the covenantee must retain some interest in the land for the benefit of which the covenant is entered into is satisfied. It is not necessary that the property for the benefit of which the restrictive covenant is entered into must be independent of and outside the demised premises: *Matilal Daga v. Sri Sri Iswar Radha Damodar Chandra Jew Thakur*, 41 C.W.N. 203: 64 C.L.J. 308. In the case of breach of restrictive covenant remedy by way of injunction as well as damages would be available against the assignee: The law as to restrictive covenants in India closely follows the law in England: *Ibid.*

A restrictive covenant or a covenant entailing forfeiture of a tenancy in a case of alienation, contained in a lease, must be strictly construed against the lessor. A covenant against alienation by lessee must relate to transfer of the entire lease-hold, and on transfer of a part only, the lessor's right of re-entry would not accrue: *Keshab Chandra Sarkar v. Gopal Chandra Chanda*, 65 C.I.J. 305.

See notes under sec. 3 cl. (9): Permanent tenure.

A stipulation by a tenant that if the land of the tenancy be acquired by the municipality or the Government the landlord shall get the compensation and the tenant will not get any is binding on the tenant whether the tenancy is governed by the Transfer of Property Act or the Bengal Tenancy Act: *Radhanath Maity v. Krishna Chandra Mukherjee*, 40 C.W.N. 722. Such a stipulation is binding on a tenant who holds over on expiry of the term of the lease: *Ibid.*

Stipulation that the entire compensation in case of acquisition shall be received by the landlord is valid.

A right exactly similar to a right of occupancy can be conferred on a tenant expressly by a grant by the landlord, where the Landlord and Tenant Procedure Act (VIII of 1869) is in force: *Jogendra Narayan Dhar v. Askarulla*, 40 C.W.N. 1301.

Right similar to right of occupancy can be conferred by a grant by the landlord.

A stranger to a contract cannot sue thereon unless by the terms of the contract a benefit is secured to him as *cestui que trust* or the promisee can be said to have been an agent for him. A mere undertaking given by an under-tenure holder in his *kabuliyat* to the tenure-holder to pay the rent due to the zemindar from the latter does not make the zemindar a *cestui que trust* or the tenure-holder an agent for him. The fact that the under-tenure-holder has paid the rent of the tenure for a long time makes no difference when the receipts have been issued in the name of the tenure-holder; *K. C. Mukherjee v. Rai Kiran Chandra Roy Bahadur*, 42 C.W.N. 1212. See also *District Board of Malda v. Chandraketu Narayan Singh*, 41 C.W.N. 1008 and *Adhar Chandra Mandal v. Dolgovindo Das*, 63 Cal. 1172: 40 C.W.N. 1037. In all these decisions the case of *Khirode Behari Dutta v. Mangovinda Panda*, 61 Cal. 841: 38 C.W.N. 682 was dissented from.

Stranger to contract, if may sue when there is no trust or agency.

8. Agricultural and Non-agricultural Leases:—The Bengal Tenancy Act applies only to a lease for an agricultural purpose and not to a lease which is a lease of agricultural land but not for agricultural purpose. The true test to determine whether a lease for collection of rent does or does not come under the Bengal Tenancy Act is not whether the lands comprised in it are or are not agricultural lands but whether or not the letting was for agricultural purpose. To establish an agricultural purpose, apart from the agricultural character of the land, the terms of the letting will have

B. T. Act applies to lease for agricultural purpose but not to lease of agricultural land which is not for agricultural purpose.

to be seen. Where the letting is merely for collection of rent and there is no question of the lessee being required or expected to bring any land under cultivation either by himself or by members of his family or by servants or labourers or by establishing tenants on the land, the mere fact that the land is agricultural or there are cultivating tenants on it would not make the lease one for an agricultural purpose, and such a lease will be governed by the Transfer of Property Act: *Munshi Alauddin Ahammed Choudhury v. Tomizuddin*, I.L.R. [1937] 2 Cal. 631: 41 C.W.N. 1001: A.I.R. 1937 Cal. 587.

Tenancy for residential purpose, user for agricultural purpose: B. T. Act does not apply.

Lease of tank and its banks: True test to determine if it is for agricultural or non-agricultural purpose.

User of the land for agricultural purposes where the tenancy is shown to have been created for residential purposes does not bring the tenancy under the Bengal Tenancy Act: *Radhunath Maity v. Krishna Chandra Mukherjee*, 40 C.W.N. 722. See also *Rajani Sutraddhar v. Baikuntha Chandra Saha*, 39 C.W.N. 1041.

In the case of a lease of a tank and its banks where the question is whether the lease is for an agricultural or non-agricultural purpose the true test is the primary object of the lease, namely, whether it is a lease of the tank or a lease of the surrounding lands for the purpose of agriculture with the tank within it. Where the lease was principally of a tank for rearing fish with grazing of cattle on its banks as subsidiary purpose, *held*, that the lease was governed by the Transfer of Property Act: *Maharaja Bir Bikram Kishore Manikya Bahadur v. Amanaddin*, 40 C.W.N. 156.

Where a raiyati settlement of land was taken and a tank was dug on it, *held*, that the mere fact that the tenancy was of a tank does not take it out of the operation of the Bengal Tenancy Act: *Bhabani Charan Banikya v. Suchitra Baisnabi*, 51 C.L.J. 25.

Lease of tank for rearing fish and its banks for grazing cattle.

The two test as to whether a lease is for agricultural purpose or not is to see whether the primary object is the lease of the tank or lease of the lands surrounding it for purposes of agriculture with the tank within it. In this respect the area of the surrounding lands is an important factor to be considered. Where the lease was of a tank for rearing fish and its banks for grazing cattle and stacking grass for cattle thereon, *held*, that the lease was a single one for the tank and its banks and it was for agricultural purposes and governed by the Bengal Tenancy Act: *Surendra Kumar Sen Chowdhury v. Chandratara*, 34 C.W.N. 1063.

Rearing of tea plants, if agricultural purpose. Tea Estate in Sylhet.

Rearing of tea plants is an agricultural purpose.

Where a lease was of a tea estate, *i.e.*, a large area of land, partly grown with tea shrubs and on a portion whereof was a factory for manufacturing tea, and partly of such a character that tea crops or other agricultural produce will be grown thereon, with an obligation on the lessee to maintain the factory and liberty to him to utilise uncultivated portion of the land for any other purpose, but not so as to affect prejudicially the tea estate and with restraint against breaking up of convertible area under tea cultivation for any other purpose: *held*, having regard to the nature of the land and to the fact that the lessee intended to use it as a tea garden the main purpose of the lease was the cultivation, and incidentally, the manufacture of tea and the case was governed by the Bengal Tenancy Act and not by the Transfer of Property Act: *Pravat Chandra Syam v. Bengal Central Bank, Ltd.*, 42 C.W.N. 761.

Such a lease does not come within the Sylhet Tenancy Act II of 1936, which has excepted from the operation of the said Act than those with tea shrubs. Such a lease in Sylhet is governed by Act VIII of 1869 under which a forfeiture clause in an agricultural lease is perfectly valid and the principle that even when forfeiture has been incurred the tenant is entitled to remain on the land up to the end of the agricultural year does not apply to the lessee of a modern tea estate of an extensive area: *Ibid.*

Where a lease expressly stated it was for residential purpose, and the land had always been used by the tenant for that purpose, the fact that it was described as *bagat* or that damages in respect of the arrears of rent and cesses were claimed, or that it was advertised for sale as a non-transferable occupancy holding, cannot, in the absence of estoppel, be said to have altered the original non-agricultural purpose. A lease for residential purposes reserving a yearly rent, if unregistered, creates a tenancy from month to month. A lease reserving a yearly rent payable in the four usual quarterly instalments creates a tenancy from the commencement of the calendar year or month as the case may be, in the absence of any indication in the lease that it was to commence from the date of the lease: *Udoytara Saha v. Habibar Rahaman*, 42 C.W.N. 771.

Lease for residential purpose: Land described as *bagat*.

Where a tenancy is created for agricultural purposes and, as such, is governed by the Bengal Tenancy Act a sub-tenancy carved out of that tenancy whether in respect of an undivided share or specific parcels, will, in the absence of anything else, be governed by the Bengal Tenancy Act even though the sub-tenancy may not be for agricultural purposes: *Sadhan Nath Das v. Aghore Nath Das*, 37 C.W.N. 818.

Subtenancy, if not for agricultural purpose, if governed by B. T. Act.

Where, after the passing of the Bengal Tenancy Act, an under-riyat with a holding of homestead and agricultural lands carves out the homestead portion only and settles it with another, the incidents of the tenancy so created would be governed by the provisions of the Bengal Tenancy Act, and the person with whom the homestead land is settled would be an under-riyat of the second degree. The provisions of the Transfer of Property Act are not applicable to the case: *Pankajini Devi v. Satish Behara*, 40 C.W.N. 86.

Sublease of homestead land by under-riyat

Where the lands included in a holding consisted partly of agricultural land and partly of homestead lands and the riyat created a sub-lease of part of the holding, *held*, that in the absence of definite proof nothing could be presumed as to the nature of the original tenancy and that the Bengal Tenancy Act had no application: *Sadhan Nath Das v. Aghore Nath Das*, 37 C.W.N. 818.

The principle of law that where the superior tenancy is an agricultural one the subordinate tenancy created out of it will also be an agricultural one, may hold good in respect of a tenancy created since the passing of the Bengal Tenancy Act, 1885, but it will not apply in respect of a tenancy created prior to the passing of the above Act and at a time when the Transfer of Property Act, 1882, was in force, especially if such sub-tenancy was created expressly for residential purposes in favour of a non-agriculturist fisherman and was never subjected to an agricultural use: *Banowari Lal Saha v. Kalidas Saha*, 37 C.W.N. 471: 58 C.L.J. 226.

Sub-tenancy for residential purpose created before T. P. Act by a riyat.

B. T. Act
when appli-
cable to
Putni.

In matters in which the Putni Regulation is silent the Bengal Tenancy Act may furnish the rules of substantive law and procedure: *Monoranjan Roy v. Munshi Selamuddin Ahmed Choudhury*, 39 C.W.N. 1003: 61 C.L.J. 346.

Line of
distinction
between
B. T. Act
and T. P.
Act.

It cannot be that the Legislature intended that a case might, at the option of a party, be brought indifferently under the provisions of the T. P. Act or of the B. T. Act. The two enactments must have been intended to have separate application, and the line of demarcation in the two is, to a considerable extent, indicated by sec. 117, T. P. Act. The distinction between cases coming under the T. P. Act, and those coming under the ordinary Rent Law, is constituted by the fact of the land being non-agricultural or agricultural: *Ramchandra Naik Kalia v. Ajodhya Singh*, 15 Pat. 8: A.I.R. 1935 Pat. 508: 158 I.C. 399.

Darpatni
lease, if for
agricultural
purpose.

A *darpatni* lease is not a lease for agricultural purposes within the meaning of sec. 117 of the Transfer of Property Act and accordingly be governed by sec. 107 of the said Act. A document varying the amount of rent payable under a registered *darpatni* lease must be registered: *Bibhuti Bhusan Pal Chowdhury v. Maya Debi*, 65 C.L.J. 590: 74 I.C. 790.

Bemeyadi
lease.

Tenant holding under *bemeyadi* lease—recorded as *raiyyat-shitiban*—land not shown to the agriculture, *held*, upon a construction of the lease that it did not create anything more than a tenancy at will: *Luxman Chandra Mistry v. Charu Chandra Mitra*, 62 C.L.J. 111.

Chukani
tenant in
Raingpur.

A *chukani* tenant in the District of Raingpur acquires a right of occupancy in the land of the tenancy if he possesses the land for more than twelve years: *Dabiruddin Sarkar v. Afaddi Mamud*, 38 C.W.N. 1093: 60 C.L.J. 110.

Garden land
for dwelling
purpose.

Where a *kabuliyat* showed that the lease was in respect of garden land, on a part of which the tenant was allowed to have his dwelling place and there was no indication in it that the lessee was to be treated as a raiyat under the Bengal Tenancy Act, or that the purpose of the lease was agricultural or horticultural, *held*, that the lease was not governed by the Bengal Tenancy Act: *Asutosh Pramanik v. Jibandhon Ganguly*, 59 C.L.J. 5. A person, who was on the land on payment of rent after the demise of his father who was holding over for a number of years after the expiration of the terms of his lease was not in the position of a trespasser and no suit for establishment of title against him was necessary: *Ibid*.

Straw.

In a contract for the sale of growing straw, the purchaser derives a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land and in that way acquires an interest in land and an *amalnama* or a *kabuliyat*, embodying such a contract requires registration: *Ali Hossain Sheikh v. Jonabali Mandal*, 62 C.L.J. 534.

Orchard.

The only distinction between orchard land and land generally described as agricultural is to be found in the proviso to sub-sec. (3) of sec. 178 which makes special provision for contracts for the temporary cultivation of orchard lands: *Saloo Jolaha v. Sampat Kumar*, A.I.R. 1930 Pat. 529.

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be called the Bengal Tenancy Act, 1885. Short title.

(2) It shall come into force on such date (hereinafter called the commencement of this Act) as the Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, appoint in this behalf. Commence-
ment.

(3) It extends by its own operation to the whole of Bengal, except— Local
extent.

(i) Calcutta, that is to say, the area described in Schedule I to the Calcutta Municipal Act, 1923 but excluding the area added to Calcutta as defined in clause (1) of section 3 of that Act;

(ii) (a) the area added to Calcutta as defined in clause (1) of section 3 of the Calcutta Municipal Act, 1923, or any part thereof; and

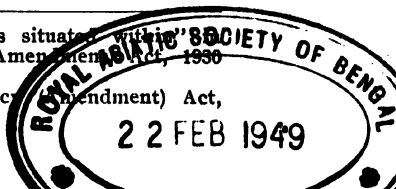
(b) any area or part of any area included in Calcutta by notification under sub-section (3) of section 543 of that Act, if such area or part is specified in a notification made in this behalf by the Local Government;

(iii) *any area constituted a municipality under the provisions of the Bengal Municipal Act, 1884, or part thereof, if such area or part is specified in a notification made in this behalf by the Local Government :

†Provided that a notification under this clause shall be no bar to the operation of this Act in respect of agricultural lands situated within the

* The words "lands other than agricultural lands situated within" s. 1 (3) (iii) were repealed by the Bengal Tenancy (Amendment) Act, 1930 (Ben. Act. II of 1930), and are omitted.

† This proviso was inserted by the Bengal Tenancy (Amendment) Act, 1930 (Ben. Act II of 1930), s. 2(b).



area specified in such notification;
and

XIV of
1874.

(iv) the Scheduled Districts* specified in the Part III of the First Schedule to the Scheduled Districts Act, 1874:

Provided that no notification shall be issued under clause (ii) or clause (iii) of this sub-section, unless—

- (a) it is previously published in the area concerned or part thereof in the prescribed manner; and
- (b) the Bengal Legislative Council† by resolution recommends that the notification be issued.

Headings of Notes.

1. COMMENCEMENT OF B. T. (AMENDMENT) ACT IV OF 1938.
2. SEC. I (3) (iii): MUNICIPAL AREA.
3. CANTONMENTS.
4. JALPAIGURI: WESTERN DUARS.
5. WESTERN DUARS: KHAS MAHALS.

I. Commencement of B. T. (Amendment) Act VI of 1938:—This Amending Act, having received the assent of the Governor was first published in the Calcutta Gazette of the 18th August, 1938, and came into force from that date. See notes under heading No. 2. "*Commencement: Act VI of 1938*" at page 4 ante.

Sec. 182 if
applies to
municipal
area.

2. Sec. 1 (3) iii—Municipal area:—Section 182 of the Bengal Tenancy Act applies to a Municipal area, which has not been excluded by a notification under sec. 1 (3) iii of that Act: *Panchanan Chaudhury v. Samatul Chandra Laha*, 41 C.W.N. 1327: A.I.R. 1937 Cal. 695.

Private land
in Canton-
ments.

3. Cantonments:—All lands in the cantonments are not necessarily the property of Government. There may be land within the cantonment limits which was never acquired by the Government and of which the ownership has always been in private hands. In the cantonments a peculiar tenure known as 'military or cantonment tenure' has grown up, the characteristics of which are that private persons settling on land within the cantonment area have ownership in the buildings they erect, but property in the soil remains in the Government. Land comprised in the Barrackpore Cantonment, and probably in other cantonments in different parts of India, was originally acquired by Government for military purposes, but that

* This Act has, with certain exceptions, restrictions and modifications, been extended to the Jalpaiguri district.

† The words "*both Chambers of the Provincial Legislature*" have been substituted for the words "*the Bengal Legislative Council*" by the Government of India (Adaptation of Indian Laws) Order, 1937.

private individuals were allowed to erect houses upon various plots. Government appear to have encouraged this form of development as providing a simple solution of the varying demand for officers' quarters, and to have recognised, subject to certain restrictions, right of private ownership in the building, while at the same time retaining in themselves the property in the soil. This is sometimes referred to as "military or cantonment tenure": *The Secretary, Cantonment Committee, Barrackpore v. Satish Chandra Sen*, 57 I.A. 339: 58 Cal. 858: 35 C.W.N. 173: 53 C.L.J. 1 (P.C.).

4. Jalpaiguri: Western Duars:—The Bengal Tenancy Act (VIII of 1885), subject to certain restrictions and modifications has been extended to the portion of Jalpaiguri District known as the Western Duars, see Notification No. 14007 L.R., 1st December, 1933, *Calcutta Gazette*, 7th December, 1933, Part I, p. 1816.

5. Western Duars: Khasmahals:—Where a chukanidar in Jalpaiguri District in the Western Duars who was given a lease of Government *Khasmahal* lands without the right to grant sub-leases sued to eject a darchukanidar from his homestead after notice to quit, *held* that the darchukanidar was liable to be ejected, and was not entitled to the benefit of sec. 48C of the B. T. Act: *Tetenga Uraon v. Dafalu Mahammad* (unreported SA. 1435 of 1934, decided on the 3rd March, 1936).

Note:—There was a motion before the Assembly at the time of the consideration of the B. T. (Amendment) Bill, 1937 to extend the B. T. Act to the whole of the Jalpaiguri District. The Revenue Minister said that the Government would examine the whole question and come to a decision.*

2. (1) The enactments specified in Schedule I hereto annexed are repealed in the territories to which this Act extends by its own operation.

(2) Any enactment or document referring to any enactment hereby repealed shall be construed to refer to this Act or to the corresponding portion thereof.

(3) The repeal of any enactment by this Act shall not revive any right, privilege, matter or thing not in force or existing at the commencement of this Act.

Effect of Repeal:—Any right accrued under a repealed enactment cannot be affected by a repealing enactment unless a different intention appears in the repealing enactment: *Jasada Kumar Ray Chaudhury v. Abdul Rahaman*, 59 C.L.J. 528.

† **3.** In this Act, unless there is something repugnant in the subject or context,— Definitions.

(1) "Agricultural year" means the Bengali year commencing on the first day of *Baisakh*: (Old cl. 11).

* See Assembly Proceedings, Vol. 51, No. 4 (Second session, 1937).

† The definitions have been rearranged in alphabetical order and re-numbered consecutively by the same Act.

Provided that where, immediately before the commencement of the Bengal Tenancy (Amendment) Act, 1928, any other year has prevailed for agricultural purposes that year shall continue to prevail for those purposes until the first day of *Baisakh* next following the date of the commencement of that Act.

(Old cl. 16). (2) "Collector" means the Collector of a district or any other officer appointed by the Local Government to discharge any of the functions of a Collector under this Act;

(3) "complete usufructuary mortgage" means a transfer by a tenant of the right of possession in any land for the purpose of securing the payment of money or the return of grain advanced or to be advanced by way of loan upon the condition that the loan, with all interest thereon, shall be deemed to be extinguished by the profits arising from the land during the period of the mortgage;

(See notes under Sec. 26G).

(Old cl. 1). (4) "estate" means land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands, prepared and maintained under the law for the time being in force by the Collector of a district, and includes Government *khas mahals* and revenue-free lands not entered in any register;

(Old cl. 9). (5) "holding" means a parcel or parcels of land or an undivided share thereof, held by a *raiyyat* or an under-*raiyyat* and forming the subject of a separate tenancy *whether the raiyyat or under-raiyyat has held the land before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928*;

Headings of Notes.

1. AMENDMENT BY ACT VI OF 1938.
2. OBJECT OF AMENDMENT.
3. EFFECT OF AMENDMENT.

1. Amendment by Act VI of 1938 :—The words in *italics* "*whether the raiyyat or under-raiyyat has held the land before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928*" were added by the Bengal Tenancy (Amendment) Act VI of 1938.

2. Object of Amendment :—The object of the amendment is to give retrospective effect to the definition of "holding" as

inserted by the Amending Act IV of 1928. There was a motion in the Council for deletion of this amendment. The Revenue Minister-in-charge of the Bill, in opposing that motion, said: "The High Court held that the definition of 'holding' which now includes part of a holding does not apply to holdings created before 1928. Just to give retrospective effect to the definition of 'holding' as inserted in 1928, this amendment has been inserted in the Bill."

3. Effect of the Amendment :—The effect of the amendment is that the definition of 'holding' now applies also to holdings created *before* the Amending Act IV of 1928. The cases of *Maharaja Bir Bikram Kisore Manikya Bahadur v. Rajabali*, 33 C.W.N. 1156 and *Srepati Charan De v. Kailash Charan Jana*, 40 C.W.N. 984 : 66 C.L.J. 93 and other cases to the same effect are no longer good law.

Note :—The definition of "holding" *before* Act IV of 1928 was as follows: "*holding*" means a *parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy.*

(6) "landlord" means a person immediately under (Old cl. 4). whom a tenant holds, and includes the Government;

Headings of Notes.

1. PROOF OF TENANCY RIGHT AND HOW A TENANCY IS CREATED.
2. BENAMDAR.
3. LAKHERAJ AND NISIHKAR.
4. ESTOPPEL.
5. ENCROACHMENT.
6. DISPOSSESSION BY LANDLORD: SUSPENSION OR APPORTIONMENT OF RENT.

I. Proof of Tenancy right and how a Tenancy is created :—A tenancy in respect of an agricultural land can be created by an oral agreement but if an instrument is at all executed for the purpose it is to be registered and if not registered is not admissible in evidence: *Ali Hossain Sheikh v. Jonabali Mondal*, 62 C.L.J. 534. Tenancy in agricultural land can be created by oral agreement.

A tenancy right under the B. T. Act can be established without proving the lease, if there is one, which is inadmissible for want of registration: *Ramnandan Prasad v. Lalei Tilakdhari Lal*, A.I.R. 1933 Pat. 636 : 145 I.C. 944.

A tenancy can be proved by oral evidence or documentary evidence: *Sunder Ali v. Nur Mamud*, 60 C.L.J. 225.

A proceeding for assessment of fair and equitable rent presupposes the existence of the relationship of landlord and tenant; and an order in such proceedings has the force of a decree until it is set aside, and is proof of the relationship of landlord and tenant: *Khetra Lal Singha Rai v. Mahomed Zikaria*, 60 C.L.J. 13. Decree in proceeding for assessment of fair rent.

2. Benamdar :—In a suit or proceeding a benamdar fully represents the beneficial owner: *Mukti Devi v. Monorami Devi*, 40 C.W.N. 1211 : 63 C.L.J. 566.

A person not a party to the suit, if he can prove that the decree-holder is his *benamdar*, is entitled to execute the decree: *Pradosh Chandra Basu v. Hugh Gordon*, I.L.R. [1938] 1 Cal. 692. See also *Nilkanto Ghosal v. Ram Charan*, 55 C.L.J. 82.

3. Lakheraj and Nishkar :—The word *lakheraj* may mean a revenue-free grant or a rent-free grant: *Kumar Raj Krishna Prosad Lal Singh Deo v. Baraboni Coal Concern, Ltd.*, 60 C.L.J. 477 (at p. 491).

The effect of Regulation XIX of 1793 in the case of invalid *lakheraj* grants is not to dispossess the ex-lakherajdar but to make the lands subject to the payment of revenue. After the lapse of sixty years the remedy of the Government to resume invalid *lakheraj* lands for the purpose of assessment to public revenue is barred—*Ibid*.

A decree in a suit for resumption of certain land alleged to be held on a claim of *lakheraj* without any grant has not the same effect as a decree passed in a suit for resumption of *lakheraj* grant made since the 1st December, 1890. Such a decree does not create a relationship of landlord and tenant and does not convert adverse possession into permissive possession: *Bejoy Gopal De Choudhuri v. Gopi Das Roy*, 41 C.W.N. 688. It was held, in the circumstances of the case, that the proprietor's right to the property and the right to assess rent had been both extinguished by limitation: *Ibid*.

When the landlord proceeds to assess rent on land in respect of which no rent was previously paid and is met with the defence of *nishkar*, the initial burden is on the landlord and that burden is not discharged by his simply proving that his lands are within the geographical limits of his estate. But if the entry in the record-of-rights is in favour of the landlord, namely, that the land is liable to be assessed with rent, the initial onus is shifted on to the defendant, and the defendant can discharge that onus by proving a grant of a rent-free title or adduce such evidence as from which such a grant can be inferred. Long possession without any demand or payment of rent will be evidence of such a grant: *Kanta Mohan Mallik v. Makhana Santra*, 39 C.W.N. 277.

Long possession without payment of rent may justify in the circumstances of a case of inference of a rent-free tenure. The onus is always on the side of the tenant to establish by evidence that the tenure he holds is rent-free when the landlord has shown that the land is within the revenue-paying estate. Where the record-of-right records the suit land as liable to pay rent and the defendant produced a *kabala* in which the land was described as a *nishkar brammattar* tenure and there was no evidence of the origin of the tenure and the landlord was not aware of the assertion of the rent-free tenure by the defendant and the landlord never claimed any rent from them; held, that, in the circumstances of the case, the defendants could not prove a rent-free tenure: *Rai Harendra Nath Chowdhury v. Amal Kumar Roy Chowdhury*, 65 C.L.J. 474. See also *Mohit Tewari v. Ramnarain Dube*, A.I.R. 1938 Pat. 110; 166 I.C. 454.

4. Estoppel :—Section 116 of the Indian Evidence Act does not deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel. It postulates that there is a tenancy

still continuing, and that it had its beginning at a given date from a given landlord, and provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property, and there is no exception even for the case where the lease itself discloses the defect of title. In the ordinary case of a lease intended as a present demise the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. The principle of the section does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, and in that sense the principle only applies to the title of the landlord who "let the tenant in" a distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. "The tenancy" under sec. 116 does not begin afresh every time the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment. Further, under the section a tenant is estopped from denying his landlord's title whether he was or was not already in possession of the property at the time when he took his lease: *Kumar Raj Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Limited, and others*, 64 I.A. 311: I.L.R. [1938] 1 Cal. 1: 41 C.W.N. 1253: 65 C.L.J. 563.

Estoppel between landlord and tenant.

A tenant is not entitled to question his landlord's title even after the termination of his tenancy, and estoppel operates in the case of tenants even after the termination of the tenancy. A tenant who was let into possession by the predecessor of his landlord cannot deny his landlord's title even though he is sued as a trespasser after the expiry of the term of his lease: *Charubala Basu v. German Gomez*, 59 C.L.J. 66: A.I.R. 1934 Cal. 499: 152 I.C. 212.

Estoppel even after termination of tenancy.

Where a defendant was let into possession by the plaintiff's father on receiving a promise from him of payment of rent and execution of *kabuliyat* he cannot deny plaintiff's title without surrendering possession: *Konaulla v. Bepin Chandra Gupta*, 62 C.L.J. 205.

Lessor's title cannot be denied without surrendering possession.

A denial of the relationship of landlord and tenant by some only of the admitted tenants in their written statement in a rent suit is not sufficient in law to sustain a forfeiture of the tenancy although those tenants might be all the recorded tenants: *Gani Mea v. Wajid Ali*, 39 C.W.N. 882: 61 C.L.J. 328.

Denial of relationship of landlord and tenant in written statement, effect of.

5. Encroachment :—When a tenant encroaches upon the adjoining lands of a third party proprietor and treats the encroached land as appurtenant to the tenancy and acquires title against such third party by adverse possession for over 12 yers, his landlord is entitled to get from him rent for the encroached area during the subsistence of the tenancy: *Saroj Kumar Bose v. Surja Kanta Sarkar*, 63 Cal. 497: 40 C.W.N. 121 (on letters patent appeal, reversing the decision appealed from, reported in 39 C.W.N. 616). See also *Surendra Kumar Roy Choudhury v. Ahmed Nawab Chowdhury*, 62 C.L.J. 177 at pp. 194-197.

Encroachment by tenant on the lands of third person, effect of.

6. Dispossession by Landlord: Suspension or Apportionment of Rent :—The doctrine of suspension of rent is not to be applied in this country in its rigid form but can only be applied

Doctrine of suspension of rent

not to be applied in this country in its rigid form.

as a rule of justice, equity and good conscience. It is not just that in every case of a lump rental and dispossession from a part, the tenant is to be allowed to hold the other lands comprised in the tenancy rent-free in perpetuity, even though the landlord be unable, for some good reason, to put the tenant in possession. An act of permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof operates as eviction, involving the penalty of total suspension of the rent. But a mistake about the extent of the premises demised or some other *bona fide* act resulting in unintentional dispossession of the tenant from a portion of the tenancy is not such dispossession as would attract the doctrine of suspension. The test to be applied is whether the tenancy is an indivisible tenancy and whether there has been interference by the landlord with the due enjoyment of the premises demised. In determining the first point, the mere fact that the tenancy is governed by one lease and therefore might be regarded as one tenure is not enough; what is to be seen is whether, in fact, the parcels of the entire property demised are such that possession from one of these parcels necessarily interferes with the due enjoyment of the others. It has also to be seen, specially in the case of *jungle* or *patit* lands, whether the dispossession from a small portion of an extensive area is due to a doubt or dispute as to the real boundaries of the area in respect of which dispossession is asserted: *Maharaja Jagadish Nath Roy Bahadur v. Surendra Prosad Lahiri*, 40 C.W.N. 166.

Where lessee did not get possession of a part. Abatement of rent.

Doctrine of suspension of rent derived from Common Law of England should not be applied rigidly in this country.

Where there was in effect no dispossession but an original failure of making over possession of a small portion of the demised land, and the tenant acquiesced and went on paying the full rent stipulated in the lease for a long period, and the rent was based on the area of the different qualities of the land; in a suit for rent by the landlord, *held*, that on the facts of the case justice, equity and good conscience required that there should be no suspension of rent but there should be an abatement of rent on account of the area of which the tenant was not in possession: *Dhirendranath Roy v. Ram Lal Datta Sarkar*, 42 C.W.N. 1030. The doctrine of suspension of rent derived from the common law of England and never embodied in the statute law of this country should not be applied rigidly in this country and it should properly be regarded as a rule of justice, equity and good conscience: *Ibid*.

Onus.

Where there is no dispute as to the identity of the subjects of a lease but the tenant denies that he has ever got possession of them, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. The landlord must not only show that the tenant is in possession but that the possession is attributable to the lease, or might be so. Where, however, the tenant has already paid rent under the lease or where the tenant claims that certain subjects, or which he did not get possession, are within the subjects let, which the landlord denies, the onus would primarily be on the tenant: *Jogesh Chandra Roy v. Emad Meah*, 59 I.A. 29: 36 C.W.N. 221 (P.C.): 55 C.L.J. 72 (P.C.).

Doctrine of suspension of rent based on

Eviction which entitles a tenant to suspend payment of rent is a doctrine of English Common Law, introduced in India, as one based on justice, equity and good conscience. It applies

to cases where the rent is a lump rent and every bit of the leased property is liable for that rent. But there are exceptions to this rule, in which on equitable consideration Court allows an apportionment of rent and gives a decree for the portion in the possession of the tenant. To constitute eviction at law, it has to be established that the lessor, without the consent and against the will of the lessee, wrongfully entered on the demised property, evicted him and kept him so evicted. In other words, to justify the lessee to a suspension of rent, the entry by the lessor must be tortious which implies that the entry must be against the consent of the tenant. Any entry by the landlord by arrangement with, or with the consent of, the lessee is not tortious. Depriving the landlord of his rent is a sort of penalty imposed upon him for his wrongful act in withholding the possession from his tenant. This penalty cannot be imposed upon him, unless his act is wrongful and is of such a nature as to give the tenant a cause of action in the Courts of law. Where the only fact proved was that by some arrangement a portion of the lease-hold was taken away from the tenant who, since then, was all along paying a reduced rent at a fixed figure and the landlord accepted such payment, *held*, there was a case for apportionment of rent and that there was no equity in favour of the tenant for a suspension: *Rameshwar Lal v. Butto Kristo Rai*, 13 Pat. 396: A.I.R. 1934 Pat. 653: 152 I.C. 992.

justice,
equity and
good
conscience.

What
constitutes
eviction.

In order to make out a case of suspension of rent the first element that has got to be established is that the lands from which the tenants have been dispossessed formed part of the original tenancy. It should also be noticed that it is not any and every act of dispossession by a landlord which ought to be penalised. A wrongful and tortious act of dispossession is necessary in order that the principle may be applied: *Dharani Mohon Roy v. Sajani Kanta Tarafdar*, 57 C.I.J. 515: A.I.R. 1934 Cal. 146: 149 I.C. 1117.

Wrongful
and tortious
act of dis-
possession
necessary
in order
to apply
doctrine of
suspension
of rent.

Whether the doctrine of suspension of rent is to apply or not clearly depends on the circumstances of each case in the sense that mere dispossession of the tenant is not enough but that it must be found that the landlord was a party to it and that too, deliberately: *Hira Lal Singh v. Babu Rinkauri Singh*, A.I.R. 1934 Pat. 75: 154 I.C. 1066.

Applicability of the doctrine of suspension of rent depends upon the circumstances of each case.

The tenant cannot claim suspension of rent merely because the landlord has attempted to extinguish his rights by means of entries in the record-of-rights: *Raja Reshee Case Law v. Satish Chandra Pal*, 35 C.W.N. 46.

Attempt to extinguish tenants rights by means of entries in record of rights if dispossession.

When a tenant raises a plea of suspension of rent on account of alleged dispossession by the landlord, the onus is upon him to prove dispossession and the extent of such dispossession and that such dispossession relates to the period for which rent is claimed by the landlord. It would not do for the tenant to prove that in a suit for rent for a previous period, it was found that there was dispossession by the landlord. It cannot be laid down as a proposition of law generally that the disposition found in a previous suit should be deemed as against the landlord to have continued up to the time of the institution of the subsequent suit and that there is any presumption against which it is for the landlord to rebut by proof of facts showing that effective steps have been taken to

Onus is upon the tenant to prove dispossession and extent of such dispossession.

Dispossession found in a previous suit.

restore the tenant to possession of the lands from which he was found to have been dispossessed in the previous suit: *Satish Chandra Pal v. Raja Reshee Case Law*, 36 C.W.N. 1134.

When a suspension of rent is claimed by a tenant on the ground of dispossession of the tenancy the *onus* is entirely on him to prove dispossession and the extent of eviction even though suspension of rent was allowed in a previous rent suit. The tenant is to prove affirmatively that the earlier dispossession continued down to the period for which rent was claimed in the present suit. The *onus* was not on the landlords to establish that the tenants had been restored to possession: *Jolindra Nath Halder v. Aswini Kumar Mandal*, 62 C.L.J. 134. An entry in a finally published record-of-rights made at a date subsequent to a previous suit for rent in which suspension was allowed, made it incumbent upon the tenant to prove subsequent dispossession and unless that was done the presumption arising from the record-of-rights stood un rebutted and the landlord was entitled to a decree for rent: *Ibid.*

Lump rental and forcible and deliberate dispossession—case of suspension and not apportionment of rent. True test in determining the question of suspension of rent.

When the rental is a lump rental, and the tenant is forcibly and deliberately dispossessed from a part of the demised premises, there can be no question of an equity to an apportionment of rent; the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion: *Mahomed Ali Fakir v. Karam Ali Talukdar*, 38 C.W.N. 1202.

Where dispossession or eviction by the land is found, the true test in determining whether suspension of the entire rent is to be ordered is not whether the rental is a lump rental or a rental at a certain rate per acre or bigha. The true test is whether the tenancy is an indivisible tenancy and whether there has been interference by the landlord with the due enjoyment of the premises or any part of them. There is a distinction between cases where the lessor has evicted the lessee from a part of the land demised and those where he has failed to deliver possession of a part of the demised premises: *Sakhisona Dasi v. Prankrishna Das*, 37 C.W.N. 301.

Right to suspension of rent, if extinguished after 12 years of dispossession.

Where the landlord enters forcibly into part of the tenant's land, the tenant is entitled to a suspension of the whole rent till he is restored to possession of the whole land because it is the duty of the landlord to protect the tenant and not to disturb him in his possession. Where the landlord commits an honest mistake about the extent of the property leased including in it some portion over which he had no disposing power or was the innocent cause of the dispossession of the tenant by a third party, from a portion of the lease-hold or otherwise acts *bona fide*, the landlord is entitled to some relief. It is not the law that when the tenant has been out of possession having been dispossessed of a part of the tenancy for more than twelve years, he can no longer claim suspension of rent and must pay rent of the part in his possession: *Krishna Chandra Ray v. Surendranath Bandopadhyaya*, 36 C.W.N. 72: 57 C.L.J. 479. Suspension of rent, if involves suspension of cesses also.—*Ibid.*

Eviction by title paramount

In order that the plea of eviction by title paramount as a ground for suspension of rent might constitute a good defence, three conditions have to be fulfilled: (1) the eviction pleaded must be from something which actually forms part of the premises demised, (2) the party evicting must have a good title, and (3) the tenant

must have quitted against his will. Forcible expulsion is not, however, necessary. Nor is it necessary for the tenant actually to go out of possession. It is enough if there is a change of title by attornment to the person with title paramount: *Raj Krishna Prosad Lal Singh Deo v. Barabani Coal Concern, Ltd.*, 62 Cal. 346: 60 C.L.J. 477: A.I.R. 1935 Cal. 368.

The landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own acts or by the acts of those who claim under him and he is liable for damages caused to the tenant: *Wazuddin Gazi v. Sayed Ahmed*, A.I.R. 1935 Cal. 464: 157 I.C. 353. When tenant entitled to damages.

The mere act of the landlord's agent in getting the record-of-rights prepared in a particular way with the intention of depriving the tenant of the enjoyment of the demised premises does not amount to eviction by the landlord so as to entitle the tenant to suspension of rent. If there has been, in fact, dispossession from a portion of the premises and the dispossession continues, the mere inclusion of the land dispossessed from in a suit for rent does not amount to restitution, so as to bear the defence of suspension of rent. The obtaining of a decree for possession by the tenant is not sufficient to defeat his right to suspension of rent; that right continues until effective steps are taken by the landlord to restore possession of the lands dispossessed from: *Raja Reshee Case Law v. Satish Chandra Pal*, 35 C.W.N. 46.

In a suit for rent the defendant did not contend that he was not in possession of the entire land in tenancy and a decree was passed for rent as claimed. In a subsequent suit for rent the defendant pleaded that he had been dispossessed from a portion of land and was entitled to a suspension of rent. It was found that from the very beginning the defendant did not get all the *kabuliat* lands; held, that the defendant was not precluded by reason of doctrine of constructive *res judicata* from pleading that he was not in possession of the entire lands of the tenancy: *Harinath Tarkaratna v. Kulesh Chandra Ghosh*, 57 C.L.J. 306. Plea of suspension of rent, if barred by constructive *res judicata* when such plea not taken in previous suit.

Where a tenant claims suspension of rent owing to an encroachment of few inches on the leased premises by the erection of a platform, the question of fact which has to be determined is, did the landlord by the erection of this platform do something of a grave and permanent character with the intention of permanently depriving the plaintiff of a portion of the subject matter of the demise: *Nishi Kanta Sarkar v. David Ezra*, A.I.R. 1936 Cal. 135. (Old cl. 12).

(7) "pay", "payable" and "payment", used with reference to rent, include "deliver", "deliverable" and "delivery"; (Old cl. 6).

(8) "Permanent Settlement" means the Permanent Settlement of Bengal, made in the year 1793; (Old cl. 8)

(9) "permanent tenure" means a tenure which is heritable and which is not held for a limited time;

Headings of Notes.

1. PERMANENT TENURE.
2. NOABAD.
3. PERMANENT TENANCY: PRESUMPTION.
4. UNDERGROUND RIGHTS: MINERALS.
5. DEBUTTAR.

Permanent tenure-holder with non *mokurari* right, if can create *mokurari* under-tenure.

1. Permanent Tenure :—A permanent tenure-holder is entitled to create a *mokarari* under-tenure which will be binding upon the purchaser of the tenure unless annulled under sec. 167 of the Bengal Tenancy Act: *Tayefa Khatun Chowdhurani v. Surendra Kumar Sen Rai*, 59 Cal. 26: 35 C.W.N. 806: 53 C.L.J. 512. Section 179, Bengal Tenancy Act, confers power on a permanent tenure-holder to create any kind of under-tenure including a *mokarari* lease. A permanent tenure-holder who has himself a non-*makarari* right is able to create a *makarari* under-tenure which becomes binding on the landlord.—*Ibid*.

Rent of permanent tenancy, if can be varied without registered instrument.

Since the Transfer of Property Act, the rent of a permanent tenancy cannot be varied without a registered document. Consequently, the landlord cannot recover rent at an increased rate on the footing of an oral agreement presumed from counterfoils of rent-receipts: *Parbati Charan Mukhopadhyaya v. Bande Ali Akon*, 40 C.W.N. 638.

Noabad, meaning of. *Noabad* taluqs are not permanently settled but temporarily settled estates.

2. Noabad :—The word *Noabad* by itself means, "newly cultivated". *Noabad* taluqs are not permanently settled but are in reality temporarily settled estates. A *Noabad* taluqdar has got security of tenure for the period of a particular settlement; but at the expiration of the settlement, the taluqdars will be entitled to a fresh settlement of the cultivated lands from the Government on terms to be arranged between the taluqdar and the Government. As regards uncultivated lands, such lands are ordinarily at the absolute disposal of Government at the expiration of a settlement and a taluqdar has no right to have a fresh settlement in respect of uncultivated lands. As regards *Etman* or under-tenure under a taluqdar, whenever it appears that the *Etman* is of long standing and that justice and equity demand that the *Etman* should be considered as an under-tenure binding on the Government, the Settlement Officer makes a note to that effect. When, however, it appears that the *Etman* is not considered binding on Government, the Settlement Officer makes a note to the effect that the *Etman* is not binding as against the Government. So far as between the Government and the *Etmandar*. But between the *Etmandar* and the taluqdar, the *Etmandar* is entitled to the rights which exist as exist between the parties and no interference is contemplated by the Settlement authorities: *Nagendra Chandra De v. Harkumar De*, 56 C.L.J. 4: A.I.R. 1932 Cal. 514: 137 I.C. 311. For the history and incidents of *Noabad* taluq, see Sir Charles Allen's Survey and Settlement Report of Chittagong and Mr. O'Malley's Gazetteer of Chittagong.

Previous possession to be taken into account as the time

The Government has the right to make settlement of lands appertaining to a *Noabad* taluq with anybody it pleases and at the time of making the settlement the fact of previous possession is also taken into account, but if settlement is made by the Government with somebody ignoring the fact of previous possession, that would

confer title on that person alone: *Nishi Chandra Sen v. Ramesh Chandra Majumdar*, 60 C.L.J. 295. of settle-
ment.

3. Permanent Tenancy: Presumption:—The question whether a tenancy is permanent or not is a legal inference from facts and is not itself a question of fact. Where it was found that lands comprised in a tenancy described as *Bagan* had all along been used as *bustee* lands and that various sub-tenants were settled on the land by the tenant for the purpose of dwelling and that the rent payable had remained unchanged all along since the creation of the tenancy beyond living memory, and that excavations had been made and trees cut and appropriated by the sub-tenants without the permission of the landlord and that there was one transfer and several successions, *held*, that the inference made by the Lower Appellate Court from these facts that the tenancy was a permanent one was not erroneous. The existence of permanent structures is not the determining factor in every case; once it is found that a particular tenancy is for dwelling purpose, it is immaterial whether permanent structures exist or not: *Kumar Manmatha Nath Mitter Bahadur v. Promatha Nath Chatterjee*, 61 Cal. 32: 38 C.W.N. 65. Tenancy if permanent or not is a question of legal inference from facts. Existence of permanent structures if necessary.

Where it is found that there are *pucca* structures on the land, there had been transfers in the past and the rent has throughout remained unchanged, *held*, that the tenancy is permanent and transferable though it might have been created before the passing of the Transfer of Property Act: *Kumud Behary Basu v. Himangsu Kumar Ghosh*, 65 C.L.J. 333.

Mere absence of *pucca* structure is not a determining factor on the question whether the tenancy is permanent or not. Nor is it sufficient for an inference of permanency that the tenants have possessed the land for a long period succeeding from father to son on payment of a uniform rent. The plaintiffs brought a suit for declaration that the defendants were not permanent but *ticca* tenants of a part of the land and trespassers in respect of the other part, that they were attempting to raise a *pucca* structure on the land which they had no right to do and prayed for an injunction that the defendants be restrained from doing so. It was proved that the defendants, their father and grandfather had been residing on the said land and they had been paying rent at a uniform rate. It also appeared from record and evidence that for 40 years the plaintiffs had notice that the defendants were claiming permanent right and yet they had suffered them to remain on the land for 40 years before instituting this suit; *held*, that the circumstances of the case established the presumption that the defendants had a permanent right: *Moslem Molla v. Subal Chandra Roy*, A.I.R. 1934 Cal. 716: 153 I.C. 1047. Absence of pucca structures not a determining factor.

The inference from the facts alleged and found as to whether a certain tenancy is permanent or not is an inference of law and not one of fact. No inference as to variation of rent can be drawn from the fact that the tenancy was alleged to consist of a larger area than what is actually found to be on measurement. The origin of the tenancy is unknown when one cannot trace out the person who created the tenancy or in whose favour it was created. When both the grantor and the grantee cannot be traced and the creation of the tenancy is lost in antiquity, it can only be said then Question of permanent tenancy is an inference of law and not of fact.

that the origin of the tenancy is unknown. From one succession and one case of transfer in favour of the grandsons of the tenant, it is not legitimate to draw an inference that the tenancy is a *mokarari* one. If a considerable amount of money is spent on structures made of earth, that fact may stand in favour of the tenant under certain circumstances, and the use of the bricks under other circumstances may be of no use in this connection. A tenant may build structures on the land rented by him which are not of a very substantial nature for the purpose of holding shops. But that itself cannot lead to the inference that the original letting was of a permanent character. Where letting value of the land has increased to a great extent in the locality but a particular tenancy is held at a low rent for a considerable number of years, that is an element which with other facts may lead to an inference that the rent was fixed in perpetuity as otherwise the landlord would have asked for an increase in the rent. As the grant of a permanent right by a shebait or a trustee would be in breach of his duty, a permanent tenancy cannot be presumed in the case of a holding by a tenant in the *debutter* land: *Narendra Nath Mondal v. Sannyasi Charan Das*, 54 C.L.J. 35: A.I.R. 1932 Cal. 398.

Facts not sufficient to draw inference of permanent tenancy.

Where for the purpose of establishing the permanency of a tenancy the following facts were relied upon, namely, (1) that the tenancy was for residential purposes, (2) that its origin was unknown, (3) that the rent had not been varied at any time and (4) that there had been one or two transfers upon which the transferee had been recognised, *held*, that these circumstances did not lead to the inference that the tenancy was a permanent one: *held*, further, that unless there be a series of transfers of a tenancy for residential purposes of which the origin is unknown and a series of recognitions, the Court would not be right in inferring that the tenancy was in its origin of a permanent character: *Rai Satyendra Nath Bhadra Bahadur v. Charu Sankar Roy*, 40 C.W.N. 854: 61 C.L.J. 570.

Residence for a long time without variation of rent, if proves permanency in its origin. *Bemeyadi* lease for building *basha* in a municipal town.

The mere circumstance that the tenant and his family have, for a long time, been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which by itself is an insufficient foundation for holding that the tenant's right was permanent in its origin: *Secretary of State v. Babu Rajendra Prasad*, A.I.R. 1937 Pat. 391: 170 I.C. 316.

A lease in which no period is specifically mentioned is not necessary a perpetual lease. A grant made for an indefinite period cures, generally speaking, for the life-time of the grantee, unless the period can be ascertained from the other terms of the instrument; and such a grant passes no perpetual or heritable interest in the absence of some words to that effect or in the absence of it appearing from the object of the grant, the circumstances under which it was created and the subsequent conduct of the parties that a perpetual grant was intended. Where a Muktear takes a *bemeyadi* lease of land in a municipal town for building a *basha* for the purpose of practising in the local Court, erection of corrugated iron shade with pucca plinths and a pucca compound wall is not inconsistent with the lease being for his life-time and the erection of such structures being within the rights of such a lessee, consent to their erection does not import an intention on the part of the lessor to

grant a permanent lease or imply the substitution of a new contract granting a permanent lease or attract the doctrine of estoppel by acquiescence as a bar to ejectment: *Chandi Charan Mitra v. Asutosh Lahiri*, 40 C.W.N. 52.

Where there was an express rent-free grant to the defendants or their predecessors-in-title but the land could not be identified, *held*, presumption of lost grant could not arise: *Kameshwar Singh Bahadur v. Shaikh Sakhawat Ali*, A.I.R. 1937 Pat. 96: 167 I.C. 238.

A presumption of lost grant cannot be made in favour of a fluctuating and unascertained body of persons such as the inhabitants of a particular village. Whether an alleged custom is reasonable or not is a question of law and it is open to the High Court in second appeal to look into the facts of a case to arrive at a finding. The material point of time to be considered in arriving at a finding as to whether a custom is reasonable or not is the time of the inception of the custom: *Asrabulla v. Kiamatulla Haji Choudhury*, 41 C.W.N. 503.

The onus of proving permanent tenancy is on the tenant alleging the same. Where the record-of-rights showed that the defendant had a resumable tenure and the plaintiff sued in ejectment after notice to quit and proved that though the defendant had been holding for 40 years, the rent was variable: *held*, that the tenancy was not permanent: *Telanga Marandi Majhi v. Chandra Mohon Singh*, A.I.R. 1933 Pat. 664: 147 I.C. 1177.

Where a person trespassed on the land of the landlord and claimed permanent right in the same and the landlord and his predecessors allowed such person to remain in possession and accepted rent from him on the basis of a permanent tenancy, *held*, that the landlord was estopped from setting up a claim that the tenancy of such person was a tenancy-at-will or a mere tenancy from year to year. The landlord was also estopped from denying the permanent nature of such tenancy: *Rani Bhuneshwari Koer v. Secretary of State*, A.I.R. 1937 Pat. 374: 169 I.C. 756.

The record-of-rights is not a document of title; when it is once shown that the landlord is entitled to rent, unless the tenant shows some contract or settlement which allows him to hold the land rent-free, the tenant is bound to prove that; it will not be proved by mere entry in record-of-rights: *Surpat Singh v. Gena Jha*, A.I.R. 1936 Pat. 315: 162 I.C. 999. Mere non-payment of rent for a period of 12 years or more is not sufficient to establish a rent-free grant—*Ibid*.

The legal inference of permanency is to be drawn from the ascertained facts taken as a whole; and though there are a number of facts pointing to a tenancy having a permanent character, the effect of these facts as evidence may be destroyed by a single piece of negative evidence. Where the tenancy dated back to some considerable time before 1874, and substantial structures were constructed on the land for residential purposes, the transfer and succession thereof was recognised by the landlord himself and there was a uniform payment of rent; *held*, that the tenancy was permanent: *Debendra Nath Dhang v. Pashupati Nath Deb*, 35 C.W.N. 1047.

Tenancies in respect of homestead or agricultural land created before T. P. Act, if transferable.

A tenancy which came into existence before the Transfer of Property Act was passed, whether it was of homestead or of agricultural lands, is not transferable. Only two exceptions have been engrafted on the rule by the case-law on the subject: (1) where the lease was for building and residential purposes, or where, as a matter of fact, *pucca* buildings were erected without objection by the landlord, and (2) where the transferability has been proved by custom; *Kamala Mayee Dasi v. Nibaran Chandra Pramanik*, 36 C.W.N. 149.

A covenant for renewal in a lease is not to be construed as a covenant for perpetual renewal, unless the said intention is unequivocally expressed. Where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for the renewal itself: *Maharaja Srish Chandra Nandi v. Doa Mahammad Byapari*, 68 C.L.J. 128. Where a lease was granted for three years and it was provided that at the end of the term the lessee would have the right to take a new settlement of lands covered by the lease as well as any excess land which would come into his possession, and it was not stated for what period the new lease would run, *held*, that by the lease the parties intended only one renewal and for a period of three years only, and as such the tenure in question was a non-permanent tenure—*Ibid*. See notes under the heading No. 7 "Landlord and Tenure" under the Preamble.

Sub-soil rights pass with permanent tenure if granted in express terms. Onus not on the Zemindar to prove reservation.

4. Underground Rights: Minerals:—The theory that sub-soil rights (minerals) passed with any permanent tenure created by a zemindar at a fixed rental, has long since been exploded. It is now settled law that the *prima facie* title in the sub-soil rights being in the zemindar, if a claimant holds under, or by virtue of a grant emanating from, the zemindar, even though the tenure may be permanent, heritable and transferable, the claimant must prove affirmatively the express inclusion of the sub-soil rights and it is not for the zemindar to prove their reservation: *Raj Kumar Gobinda Narayan Singh v. Sham Lal Singh*, 58 I.A. 125: 58 Cal. 1187: 35 C.W.N. 521 (P.C.): 53 C.L.J. 333 (P.C.).

Sub-soil rights pass to putnidar only when granted in express terms.

Patni tenures generally are on the same footing as to sub-soil rights as other permanent, heritable and transferable tenures created by a zemindar. The sub-soil rights pass to the putnidar only when granted in express terms; general words such as "*darobast hakuk*" "with all rights" are insufficient for that purpose: *Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat*, 58 I.A. 228: 35 C.W.N. 870 (P.C.).

Lakherajdar's right to minerals.

The title to the underground rights is in the *lakherajdar* who holds under an invalid *lakherajdar* which has not been resumed by the Government: *Kumar Raj Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern Ltd.*, 62 Cal. 346: 60 C.L.J. 477: A.I.R. 1935 Cal. 368.

Zemindar's right to minerals.

As between zemindar and jagirdar the zemindar must be regarded as the owner of the minerals: *Bageswari Charan Singh v. Kumar Kamakhya Narain Singh*, 58 I.A. 9: 35 C.W.N. 233 (P.C.): 10 Pat. 296 (P.C.): 53 C.L.J. 11 (P.C.).

5. Debutter :—It is not necessary in order to establish *Debutter* that any deed of endowment should be forthcoming in every case. The course of dealings by the parties may furnish evidence of dedication in the absence of any deed : *Rowland Duncan Cromatic v. Sree Sree Isswar Radha Damodar Jew*, 62 C.L.J. 10. No deed of endowment necessary to establish *Debutter*.
A rent-free land is not necessarily a *debutter* property—*Ibid*. 10. Rent-free land not necessarily *debutter* property.

As the grant of a permanent right by a *shebait* or a trustee would be in breach of his duty, a permanent tenancy cannot be presumed in the case of a holding of a tenant in *debutter* land : *Narendra Nath Mundol v. Sannyasi Charan Das*, 54 C.L.J. 353 : A.I.R. 1932 Cal. 398. Permanent tenancy cannot be presumed in case of a holding of a tenant in *debutter* land.

The founder of a Hindu *debutter* is competent to lay down rules to govern the succession to the office of *shebait*, subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law : *Monohar Mukherjee v. Bhupendra Nath Mukherjee*, 60 Cal. 452 (F.B.), 37 C.W.N. 29 : 56 C.L.J. 468 : A.I.R. 1932 Cal. 791 : 141 I.C. 544. Right of founder of *Debutter*.

A *shebait's* position towards the *debutter* property is not similar to that in England of a trustee towards the trust property ; it is only that certain duties have to be performed by him which are analogous to those of trustees : *Ibid*. Position of *shebait* towards *Debutter* property.

Ordinarily a *shebait* cannot grant a permanent lease at a fixed rent but he may do so in a case of unavoidable necessity. A *mokarari patta* of *debutter* land may be upheld against the successor of the *shebait* where the *shebait* required money either for the repair and completion of a temple for which no other fund could be obtained or for a purpose which fell into the category of protecting the estate from injury or deterioration : *Hrishikesh Ray v. Sri Sri Krishna Ray Jin Thakur*, 66 C.L.J. 28. *Mokarari* lease of *Debutter* land, if can be granted by *Shebait*.

(10) "prescribed" means prescribed by rules made by the Local Government under this Act; (Old cl. 15).

(11) "Proprietor" means a person owning, whether in trust or for his own benefit, an estate or a part of an estate; (Old cl. 2).

Proprietor :—A *lotdar* who holds land in the Sunderbans under a grant made by the Government under the Waste Land Rules of 1853 on terms that the *lotdar* is to pay a revenue fixed on the basis of the area for 99 years and thereafter was to be entitled to a re-settlement—under conditions applicable to owners of temporarily settled estates is a proprietor of such land and not a tenure holder under the Government : *Ambuj Bashini Chaudhurani v. Secretary of State for India*, I.L.R. [1938] 2 Cal. 1. *Lotdar* in *Sunderbans*, if proprietor.

(12) "registered" means registered under any Act for the time being in force for the registration of documents. (Old cl. 18).

(13) "rent" means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant : (Old cl. 5).

in sections 53 to 68, both inclusive, sections 72 to 75, both inclusive, Chapter XIV and Schedule III of this Act, "rent" includes also money recoverable under any enactment for the time being in force as if it was rent;

Interest on rent, is not rent, and a suit for interest only is not maintainable.

Actual rent.

I. Rent :—Interest on rent cannot be held to be rent as defined by the Act and a suit for recovery of interest only, apart from any claim for rent on which interest may be payable either under a contract or under the law, is not maintainable as a suit for rent: *Sheikh Eusuf v. Jitendra Nath Roy*, 38 C.W.N: 184.

The rent is paid by a tenant for the use and occupation of the land. Actual rent is the rent actually agreed upon between the parties. It is quite possible for tenants to be inducted upon a land upon an agreement to pay the customary rent and this is perfectly a good contract and on proof of what has been customary such rent is leviable: *Surjo Mohan Thakur v. Chhote Singh*, 174 I.C. 447.

Fees or tolls in a *hat*, if rent

Fees or tolls paid by sellers or purchasers in a *hat* held over a portion of land of a tenure cannot be deemed "rent" as such persons are not tenants but licensees: *Khudan Lal v. Nafijuddin*, A.I.R. 1933 Pat. 36: 142 I.C. 43.

Value of paddy and molasses mentioned in the lease.

Rent payable partly in kind—paddy and molasses—value mentioned in the lease—tenant's liability for rent: *Bishnu Mandal v. Charu Chandra Chatterji*, 52 C.I.J. 179.

Liability to rent on basis of *jama-wasil-bakis*.

Where the question arose whether the revenue of a holding in Dehi Panchannagram within the district of 24 Parganas was in arrears, and in the *jama-wasil-bakis* of the Collectorate the year of arrear was entered in Bengali while the English date was given whenever the revenue was recoverable by the Collector, *held*, that the accounts should be read in the light of the *jama-wasil-bakis* and the liability for arrears determined on that basis: *Jogendra Nath Das v. Damodardas Khanna*, 60 Cal. 302: A.I.R. 1933 Cal. 373: 144 I.C. 125.

Stipulation to pay certain amount on failure to deliver paddy within a specified time, is by way of penalty and not rent. Partition between co-sharer landlords: Tenant's liability to rent.

A stipulation in a *kabuliyat* that if paddy rent is not paid by a certain time half as much again would be required to discharge the arrear is one by way of penalty and comes under sec. 74, Contract Act with the result that the landlord will only get the reasonable compensation in the discretion of the Court: *Shyam Lal Bose v. Kalim Shaikh*, 50 Cal. 84: 34 C.W.N. 905.

Excepting under the Estates Partition Act there is no procedure by which the tenants themselves can be brought on the record or brought before the Court to show that they have agreed to the partition which is about to take place or has taken place between the co-sharer landlords. Therefore where after the partition a co-sharer landlord sues a tenant for rent and the question is whether there has been an apportionment of rent it has to be seen whether the tenant has agreed to the partition: *Deo Narain Singh v. Lila Kuer*, A.I.R. 1936 Pat. 96: 160 I.C. 1079.

A landlord is bound to put the tenant in possession and cannot recover rent until he does so. The fact that he himself was not in *khas* possession and that the tenant knew that a third person

was in possession does not make the rule inapplicable. When there is already a tenant holding under the landlord, the landlord is not competent to grant a lease in favour of another ; such a lease would be of no effect in law and on its basis no rent can be recovered by the landlord : *Haripada Dutt v. Gobinda Chandra Das*, 60 C.L.J. 220 : A.I.R. 1935 Cal. 193.

Where by the terms of a compromise, the tenants bound themselves, in addition to the rent for the under-tenure, to supply to their landlords so much *sal* and other wood annually from the jungle lands of the *mouza*, a suit for the wood by the landlord is a suit for rent : *Nagenbala Dasee v. Sridam Mahato*, 59 Cal. 513 : A.I.R. 1933 Cal. 69 : 141 I.C. 858.

Agreement to pay *sal* and other wood, if also part of rent.

Where a *kabuliat* provided that a tenant would hold two *haks* of land at a certain rate, a separate oral agreement that one *hal* thereof would be held rent-free, is not admissible in evidence : *Pulin Biharee Deb v. Ramakanta*, I.L.R. [1938] 1 Cal. 48 : A.I.R. 1938 Cal. 356.

Suit for assessment of rent on *mal* lands limitation : *Bijoygopal De Choudhuri v. Gopee Das Roy*, I.L.R. [1937] 2 Cal. 234 : 41 C.W.N. 688.

Suit for assessment of *mal* lands : Limitation.

2. Cess:—The definition of rent is sufficiently wide to include cesses which are payable by the tenant to the landlord and as a consideration for the use and occupation of the lands of the tenancy. Where the plaintiff sued for recovery of excess cess in respect of a *putni mahal* for four years together with damages on the basis of certain terms in a *kabuliat*, held, that the suit was for rent and not for money and that a second appeal was maintainable : *Mohanta Bhagaban Das v. Raja Bhupendra Narayan Singh*, 60 Cal. 587 : 57 C.L.J. 120 : A.I.R. 1933 Cal. 527 : 144 I.C. 676.

Suit for excess cess on contract is one for rent and not for money.

Note to sec. 24 of the Cess Act and rule 66 of the Cess Manual framed by the Board of Revenue not being repugnant to anything contained in the Act cannot be held to be *ultra vires* or inoperative : *Secretary of State for India v. Jitendra Nath Roy*, 62 C.L.J. 541.

Note to Sec. 24 of the Cess Act if *ultra vires*.

A Civil Court has no jurisdiction to hold that a person is a cultivating raiyat for the purpose of the Cess Act when the Collector made the assessment on the footing that he is a tenure-holder. The Cess Act itself provides for the remedy of the aggrieved persons. An *intra vires* assessment cannot be challenged by a party in a Civil Court : *Lalit Kishore Mitra v. Nathu Mandal*, 63 Cal. 379 : 40 C.W.N. 14 : 62 C.L.J. 367.

The Civil Court has jurisdiction to grant relief in a case where the Cess Department has acted *ultra vires* and imposed liability for cess on income which is not subject to cess. Sec. 93 of the Cess Act debars a Civil Court from questioning the valuation made under that Act, and a plea by the defendant that he is an occupancy raiyat and not a tenure-holder and that the valuation is wrong is not entertainable by the Civil Court : *Braja Behari Dass v. Ram Narayan Rai*, 17 Pat. 436 : 174 I.C. 752.

Valuation cannot be questioned in Civil Court.

It is not open either to the landlord or the tenant to question the valuation roll in a Civil Court, unless it was prepared without jurisdiction : *Maharajadhiraj Sir Kameshar Singh of Darbhanga v. Kulada Prosad Sahu*, 40 C.W.N. 153 : 62 C.L.J. 303.

Omission to mention amounts payable in each instalment and omission or mistake in mentioning dates fixed by Board of Revenue in notice under sec. 54 of the Cess Act, if vitiates notice.

Embankment Cess.

Cultivating raiyat, meaning of, under the Proviso to Cess Act.

When notice required by sec. 54 of the Cess Act is not properly published with all the details, a suit to recover cesses under Sec. 58 of the Act must fail: Omission to specify the exact amounts payable by the defendant namely the amount payable in each instalment where instalments are permitted and omission or mistake in mentioning the dates fixed by the Board of Revenue are not irregularities but illegalities vitiating the notice: *Jitendra Nath Roy v. Madan Mohon Das Mahanta Maharaj*, 41 C.W.N. 220 (affirming, on letters Patent appeal, the decision of a single Judge reported in the case of *Madan Mohan Das Mohanta Maharaj v. Jitendra Nath Roy*, 62 C.L.J. 564).

Where the agreement between the zemindar and the tenure-holder provided that no demand should be made either for any excess *jama* or for any other imposition over and above the *mokurari jama*; held, that the zemindar did not preclude himself from recovering a statutory obligation subsequently levied, namely, the embankment cess: *Sashisekhar Sen Biswas v. Maharaja Bir Bikram Kishore*, 59 Cal. 255: 35 C.W.N. 1239.

A tenant who does not cultivate the entire lands of his tenancy but cultivates only a portion thereof and has settled the rest of the lands with under-raiyats who actually cultivate the land and who are not temporary tenants is not a cultivating raiyat within the meaning of the Cess Act: *Maharaja Bir Bikram Kishore Manikya Bahadur v. Sujatali*, 39 C.W.N. 909.

(Old cl. 17). (14) "Revenue-officer," in any provision of this Act, includes any officer whom the Local Government may appoint, by name or by virtue of his office, to discharge any of the functions of a Revenue-officer under that provision;

(Old cl. 14) (15) "signed" includes "marked", when the person making the mark is unable to write his name; it also includes "stamped" with the name of the person referred to;

(Old cl. 13). (16) "succession" includes both intestate and testamentary succession;

(Old cl. 3). (17) "tenant" means a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person:

provided that a person who, under the system generally known as "*adhi*", "*barga*" or "*bhag*", cultivates the land of another person on condition of delivering a share of the produce to that person, is not a tenant, unless—

(i) such person has been expressly admitted to be a tenant by his landlord in any docu-

ment executed by him or executed in his favour and accepted by him, or

(ii) he has been or is held by a Civil Court to be a tenant;

Proviso to cl. (17): Retrospectivity:—Sec. 3 clause (17) is not retrospective in its effect: *Suresh Chandra Dutta v. Mahendra Chandra De*, 34 C.W.N. 845. It is submitted with great respect that the change effected by the proviso to sec. 3, cl. (17) will apply even to *bargadars* who have been recorded in the Record-of-Rights as raiyats or under-raiyats unless they come within either of the two clauses of the proviso. See in this connection comment in 34 C.W.N. pp. 135-137 (notes portion). Proviso to cl (17), if retrospective in operation.

(18) "tenure" means the interest of a tenure-holder or an under-tenure-holder; (Old cl. 7).

(19) "village" means the area defined, surveyed and recorded as a distinct and separate village in— (Old cl. 10).

(a) the general land revenue survey which has been made of the Province of Bengal, or

(b) any survey made by the Government which has been adopted by notification in the *Calcutta* or *Eastern Bengal and Assam Gazette* or which may be adopted by notification in the *Calcutta Gazette* as defining villages for the purposes of this clause in any specified area;

and, where a survey has not been made by, or under the authority of, the Government, such area as the Collector may, with the sanction of the Board of Revenue, by general or special order declare to constitute a village:

Provided that, when an order has been made under section 101 directing that a survey be made and a record-of-rights prepared in respect of any local area, estate, tenure or part thereof, the Government may, by notification in the *Calcutta Gazette* declare that in such local area, estate, tenure or part thereof "village" shall mean the area which for the purposes of such survey and record-of-rights may be adopted by the Revenue-officer with the sanction of the Board of Revenue accorded under the provisions of section 115A as the unit of survey and record.

CHAPTER II.

CLASSES OF TENANTS.

Classes of
tenants.

4. There shall be, for the purposes of this Act, the following classes of tenants (namely):—

- (1) tenure-holders, including under-tenure holders,
- (2) *raiyats*, and
- (3) under-*raiyats*, that is to say, tenants holding whether immediately or mediately, under *raiyats*;

and the following classes of *raiyats* (namely):—

- (a) *raiyats* holding at fixed rates, which expression means *raiyats* holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,
- (b) occupancy-*raiyats*, that is to say, *raiyats* having a right of occupancy in the land held by them, and
- (c) non-occupancy-*raiyats*, that is to say, *raiyats* not having such a right of occupancy.

Under-
raiyat may
sublet and
the sub-
lessee is an
under-
raiyat.

Tenants holding immediately or mediately under a raiyat:—

Where an under-raiyat under an under-raiyat acquires by local custom an occupancy right in the land, the raiyat purchasing the right of his under-raiyat in execution sale for arrears of rent not held under Chapter XIV of the B. T. Act, cannot eject the under-raiyat, who held under the under-raiyat, whose interest was sold. Sec. 4 (3), B. T. Act, indicates that under-raiyats have power to sublet their under-raiyatis and the sublessees are under-raiyats: *Dwarik Mandal v. Nalini Kanta Mitra*, I.L.R. [1937] 2 Cal. 689: 175 I.C. 509: A.I.R. 1938 Cal. 223.

Meaning of
"tenure-
holder" and
"*raiyat*."

5. (1) "Tenure-holder" means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors in interest of persons who have acquired such a right.

(2) "*Raiyat*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by servants or labourers or with the aid of

partners, and includes also the successors in interest of persons who have acquired such a right.

Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(3) A person shall not be deemed to be a *raiyyat* unless he holds land either immediately under a proprietor or immediately under a tenure-holder.

(4) In determining whether a tenant is a tenure-holder or a *raiyyat*, the Court shall have regard to—

(a) local custom ; and

(b) the purpose for which the right of tenancy was originally acquired.

(5) Where the area held by a tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder until the contrary is shown.

Headings of Notes.

1. TENURE-HOLDER OR RAIYAT.
2. ORIGINAL PURPOSE FOR WHICH TENANCY IS CREATED : NATURE OF TENANCY.
3. INTERMEDIATE INTEREST BETWEEN A ZEMINDARY AND A PATNI.
4. AGRICULTURAL PURPOSE.
5. CL. (5).
6. CERTAIN TERMS.

I. Tenure-holder or Raiyat:—The true test whether a tenancy is a tenure or a raiyati depends upon the purpose for which it was acquired. When notwithstanding statutory presumptions there is evidence proper for the findings of fact by the lower Appellate Court those findings are final and conclusive: *Midnapore Zemindary Co. Ltd. v. Secretary of State*, 56 I.A. 388 : 34 C.W.N. 1 (P.C.) : 51 C.L.J. 1 (P.C.).

The definitions of “tenure-holder” and “raiyyat” in the B. T. Act are not exhaustive and a person who may have originally a large tract of land ostensibly with the object of cultivating it himself, or by his servants, or members of his family, may, by his conduct, afterwards convert himself, so far as third parties (under-raiyats) are concerned, into a rent-receiver and give those persons the right to remain upon the land without being liable to be ejected at his instance: *Devan Manjhi v. Bhojal Sangahi*, A.I.R. 1935 Pat. 366 : 158 I.C. 157.

A raiyat is a cultivating tenant either of a proprietor or a tenure-holder, and an under-raiyat a tenant of a raiyat: *Anup Mahto v. Mitra Dusadh*, 61 I.A. 93 at p. 101 : 13 Pat. 254 : 38 C.W.N. 1.

Tenure-holder or raiyat : True test.

Definitions of tenure-holder and raiyat not exhaustive.

Raiyat may hold either under proprietor or

tenure-
holder.

365 (P.C.): 59 C.L.J. 147 (P.C.): A.I.R. 1934 (P.C.) 5: 147 I.C. 977.

Lands were leased for nine years under *kabuliyat* which provided *inter alia*: "I and my heirs and representatives neither have nor shall have any sort of interest in the said land save and except to get the produce, to cultivate the land and to pay the rent. I shall not change the features and status of the land, nor shall I take recourse to any illegal act or interfere in any manner with regard to the land, which may go against the wishes of the said Babu or against the provision of the law," held, on a construction of the *kabuliyat*, that the lands were let for the purpose of cultivation in sec. 5 (2) and the tenant therefore acquired a right of occupancy; that in so far as the clause might be said to restrict the right to cultivate, it would constitute an attempt to contract out of the Tenancy Act and therefore ineffective; and that the holding must be considered as an entire unit, both paddy lands and *kharbur* lands being taken as being under cultivation within the meaning of the Bengal Tenancy Act; *Radha Krishna Thakurji v. Babu Raghu-nandhan Sinha*, 62 I.A. 64: 14 Pat. 335: 39 C.W.N. 547 (P.C.): 61 C.L.J. 216 (P.C.).

Every person who is a cultivator is not necessarily a raiyat. A raiyat is one who cultivates the land as a tenant directly under a zemindar or a tenure-holder, and the test of tenancy is whether the cultivator in question obtains an interest in the land, and this in turn is a matter of the paramount intention of the parties to the contract. The fact that the cultivator is brought upon the land for the purpose of cultivating or that he happens to be a settled raiyat of the village in which the lands are situated is by no means conclusive in determining whether his advent upon the land is or is not in the capacity of a raiyat: *Bengal North Western Railway Co., Ltd. v. Janki Prasad*, A.I.R. 1936: Pat. 362: 163 I.C. 525.

Although an heir of a raiyat is deemed to be a raiyat under sec. 5 (2) of the Bengal Tenancy Act, he can be liable for rent of a holding only when there is privity of estate by succession. Such privity is established when the raiyat accepts the inheritance. Absence of possession or cultivation by himself cannot, by itself, exonerate him from liability to pay rent. But absence of possession is cogent evidence to be taken into consideration with other facts in determining whether the inheritance was accepted or not; *Maharaja Bahadur Sir Prodyot Coomar Tagore v. Hamidar Rahman Mia*, 41 C.W.N. 1154.

The lessee who was a pension-holder, a Brahmin and a resident of Midnapur, obtained a permanent lease of 99 bighas in the Sundarbans on payment of a *selami* of Rs. 1,000/-. The lease conferred on the lessee very large rights in the property and the clause which referred to cultivation also referred to dwelling-houses being built, tanks being excavated and interest granted from generation with power to transfer by gift or sale; it appeared that about 20 bighas were cultivated by tenants and the rest by *bhag chasis*; held, that the lease did not create a raiyati holding: *Ram Charan Tripathi v. Mohan Mohan Jana*, 35 C.W.N. 1143.

2. Original purpose for which tenancy is created: Nature of tenancy:—When a question arises as to the nature of a tenancy, what has to be seen under the Bengal Tenancy Act (1885) is the

purpose for which the right of tenancy was originally required. As regards a tenancy existing from before, there having been no definition of "raiya" in any earlier enactment, in order to give a person the status of a raiya it must be found that he was in occupation by cultivation and payment of rent, a contract conferring such status being deducible from such circumstances. In the case of a tenancy of the latter kind, if nothing else is known than that the entire tenancy since its inception was in the cultivating possession of the tenant for a number of years, it is possible that the tenant was a raiya, even though he may have subsequently let in sub-tenants in portions of the lands of the tenancy. But if all that can be gathered of an old tenancy of unknown origin is that during the first few years the tenant was in cultivating possession of part of the lands, and then went on increasing his own cultivation and at the same time letting in sub-tenants on the rest of the lands the position is very different, and it would require investigation of all other attendant circumstances in order to find out whether the tenant was a raiya or a tenure-holder. In some cases the subsequent use of tenancy may also be profitably examined, but only to the extent that such use throws light on the attendant circumstances, and in that way the original purpose of the tenancy. Where such examination is justified, the use during the entire period of the existence of the tenancy has to be taken into account: *Mahomed Mayenuddin Mea v. Maharaja Bahadur Sir Prodyot Coomar Tagore*, 61 C.L.J. 530 : A.I.R. 1936 Cal. 189.

Where according to the terms of a lease the lessee is himself to cultivate the land and not settle it with any tenant, the lessee is not a tenure-holder but a *raiya*. The purpose of the tenancy is the determining factor to see whether in the case of a particular lease the lessee is a tenure-holder or a *raiya* and the use of the word like *mustajiri* is irrelevant: *Suraj Mohan Thakur v. Ganesh Prasad Mandar*, 175 I.C. 501 : A.I.R. 1938 Pat. 235.

The expression *mustajiri* means "farming lease—practically equivalent to *thika*,"—*Ibid*.

The real question under sec. 5 of the Bengal Tenancy Act is not whether the purpose of the tenancy was cultivation but whether it was cultivation by the tenant himself or by members of his family or by hired servants: *Ram Charan Tripathi v. Mohon Mohon Jana*, 35 C.W.N. 1143 : A.I.R. 1932 Cal. 195 : 136 I.C. 601.

3. Intermediate interest between a Zemindary and Patni:—See notes under the Preamble under heading "Landlord and Tenant".

4 Agricultural Purpose:—See notes under the Preamble under heading "Agricultural and Non-agricultural Leases."

5. Cl. (5):—Where a tenancy exceeded 100 bighas in area and was recorded in the Record-of-Rights as a tenure, and the lease which was a confirmatory lease stated that the tenancy was a *raiya* one, and prohibited sale, erection of permanent structure, digging of tank or ditches, cutting of trees and subletting of lands permanently, held, that the tenancy was a *raiya* one and the *kabuliyat* rebutted the presumption under secs. 5 and 103B of the Bengal Tenancy Act: *Jitendra Nath Roy v. Raicharan Biswas*, 33 C.W.N. 356.

Presump-
tion of
record of
rights.

The plaintiff brought a suit for *khas* possession of certain lands and for recovery of rent, alleging the defendant held a *kolekarsa* under the plaintiffs. The defence was that the defendant had a *karsa* right in the land and was not liable to be ejected. In the settlement record, the plaintiff's interest had been recorded as *niskar chakran* and the defendant's interest as *kolekarsa*. The lower Court held that as the area of the *chakran* land exceeded eight hundred bighas, the *niskar chakran* should be presumed to be a tenure under sec. 5 (5) of the Bengal Tenancy Act and that the defendant was not therefore liable to be ejected; *held*, that the lower Court erred in law in not at all taking into consideration the presumption arising in favour of the plaintiffs from the entry in the record-of-rights: *Kanku Sardar v. Shafizuddi*, 55 C.L.J. 569: A.I.R. 1932 Cal. 870: 139 I.C. 832.

The presumption contained in sub-section (5) of sec. 5 is a statutory presumption; but a presumption depending upon the largeness or smallness of the area of the tenancy, being founded on reason, had all along existed even before that Act, as a presumption of fact: *Mahammad Mayenuddin Mea v. Maharaja Bahadur Sir Prodyot Kumar Tagore*, 61 C.L.J. 530 at p. 535.

There is nothing in sec. 5 (5), which supports the suggestion that the tenant must hold 100 standard bighas under one and the same title: *Krishna Chandra Mukherjee v. Manik Lal Mukherjee*, A.I.R. 1938 Cal. 246.

Jote.

6. Certain terms:—The word “jote” does not necessarily mean that it is a tenure; it simply means a tenancy: *Sariatulla v. Habibar Rahaman Khan*, 39 C.W.N. 454.

It does not necessarily mean an occupancy holding: it may mean a raiyati, under-raiyati or any sort of holding for the purpose of cultivation: *Upendra Kisore Sarkar v. Shaik Khalil Fakir*, 55 C.L.J. 170.

In a suit for partition, on the allegation that N had a raiyati jote in respect of the lands in suit and that N died leaving as heirs two daughters, by the heirs of one of the daughters claiming a partition and separate possession of her share; *held*, that the mere expression “jote” would not necessarily lead to the inference that the right of N was heritable. The onus of proof was upon the plaintiffs who claimed a share of the land in right of inheritance. It was for them to prove that the right of N was heritable. If the plaintiffs had proved that N's rights were heritable, then the mere fact that the defendant N's son took a fresh settlement two years after the death of N would not destroy the heritable right of his brothers and sisters: *Dhan Gaji v. Nazamaddin Pradhania*, A.I.R. 1934 Cal. 398: 148 I.C. 729.

“Dharja”, “Abadharita”, “Nirdharita”, meaning of, *see notes under sec. 7.*

‘Malik’.

The word “malik” as applied to the grantee in a deed of grant, imports full proprietary rights, unless there is something in the context to indicate an intention to the contrary: *Sarajubala Debi v. Jyotirmoyee Debi*, 35 C.W.N. 903 (P.C.).

Miras and
Putni
talukdari
patta.

The words “*miras talukdari patta*” imply a permanent heritable estate. The words “*putni talukdari patta*” import a permanent heritable estate subject to a fixed rent; *Ibid*,

The word "*Mahal*", which is used in the Regulations (see *Mahal*. clause 2, section 11, Regulation XLII of 1803) as the equivalent of the English word 'Estate', signifies, not the property of one person but the property held under one title, whether by one person or by many; *Tarakeswar Pal Chowdhury v. Kumār Satish Kanta Roy*, 51 C.L.J. 297.

The word "*Mahalwari*" is used in contradiction to *Mauzawari* *Mahalwari*. which defines every separate mouzah or village in the Revenue Records: *Ibid*.

A '*Taidad*' is an extract from a public register or other document of authority in confirmation of a claim: *Ibid*. *Taidad*.

Where the word "*chukani*" used in a *kabuliyat* referred to only an under-raiyati for a term of years which was not heritable, *held*, that the lease did not create such a *chukani* right as is generally recognised in the Rangpur district, and the under-raiyat did not acquire a right of occupancy by 12 years occupation, and on the death of the under-raiyat his heirs were liable to ejectment as trespassers: *Sariatulla v. Habibar Rahaman Khan*, 39 C.W.N. 454. *Chukani in Rangpur District*.

There is a general presumption that the land in a *zemindary* is the property of the *zemindar* and held under him. Where the *zemindar* and the tenure-holders are members of the same family the natural inference would be that it was a *khorphosh* or maintenance *jaigir* granted to the tenure-holders by the *zemindar* as the head of the family, and this presumption is not rebutted by the fact that the tenure-holders belong to the senior line of the family: *Bageswari Charan Singh v. Kumar Kamakhya Narain Singh*, 58 I.A. 9: 35 C.W.N. 233 (P.C.): 10 Pat. 296 (P.C.): 53 C.L.J. 11 (P.C.). *Khorphosh or Maintenance Jaigir*.

The word "*Bharatia*" is generally used with regard to tenants who have rented a house temporarily or from month to month. It is seldom used with regard to a permanent tenant or with regard to a tenant who has taken a lease of a piece of land only from the landlord: *Narendra Nath Mondal v. Sannyasi Charan Das*, 54 C.L.J. 353: A.I.R. 1932 Cal. 398: 137 I.C. 658. *Bharatia*.

Where a lease *thika mokra* was created, *held*, that the word *thika* in the context in which it appears clearly indicates the creation of a tenancy and that the word "*mokra*" in the context in which it appears and having regard to the provisions in the *kabuliyat* taken as a whole imports that the rent had been fixed in perpetuity: *Bhabataran Pahari v. Trailakhya Nath Bag*, 55 C.L.J. 398. *Thika. Mokra*.

Where a *patta* contained the words '*thika Mokra mourashi putra poutradhikrame*' and there will be no remission of rent on any account, *held*, that the word '*thika*' did not mean temporary. It means a contract by which a person engages to pay a fixed amount of rent or rents and does not mean temporary: *Hanuman Das Mundra v. Damodar Laik*, 59 C.L.J. 381.

Where the contract was to pay the "*ticca*" sum of Rs. 20/-, *held* that the word "*thika*" meant fixed in perpetuity: *Ram Charan Chakravorty v. Raj Kumar Chakravorti*, 61 C.L.J. 351. See notes under sec. 7.

The words *Daemi kaemi* indicate permanent tenancy: *Surendra Kumar Nandi v. Bepin Chandra Guha*, 38 C.W.N. 1091. *Daemi Kaemi patta*.

Bemeyadi.

Etymologically the word "*bemeyadi*" would appear to indicate absence of a term: *Raja Janaki Nath Roy v. Dina Nath Kundu*, 35 C.W.N. 982.

The question whether a tenancy is perpetual or terminable at will cannot be resolved by reference only to the use and meaning of the word "*bemeyadi*" but should be determined after consideration of all the provisions of the lease by which the rights of the parties are governed: *Ibid.*

Bemeyadi lease for building *basha* in a *Municipal town*, see *Chandi Charan Mitra v. Ashutosh Lahiri*, 40 C.W.N. 52. See notes under sec. 7.

Jibka
tenure.

The use of the expression *Jibka* tenure in a maintenance grant does not necessarily mean that the grant is limited to the life of the grantee or that it is resumable: *Nagendra Chandra Nag v. Purna Chandra Gupta*, 39 C.W.N. 98: 60 C.L.J. 384.

Bazezamin.

The word '*Bazezamin*' is used in the sense of revenue-free grant: *Kumar Raj Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern Ltd.*, 60 C.L.J. 477 at p. 486.

CHAPTER III.

TENURE-HOLDERS.

Enhancement of rent.

6. Where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof—

(a) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

(b) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded and that the lands are capable of affording it.

Enhancement of rent.
Tenure held since Permanent Settlement liable to enhancement only in certain cases.

[**Note** :—All the provisions of the Act relating to enhancement of rent have been suspended for a period of 10 years with effect from the 27th August, 1937, see sec 75A inserted by the Bengal Tenancy (Amendment) Act VI of 1938.]

Headings of Notes.

1. WHETHER ANY DOCUMENT IS NECESSARY TO CREATE A PERMANENT TENURE.

2. TENURE HELD SINCE PERMANENT SETTLEMENT: SEC. 6, CL. (a) AND SEC. 7.

I. Whether any document is necessary to create a permanent tenure :—A lease in respect of permanent tenure of agricultural lands under the Bengal Tenancy Act comes under the operation of sec. 117 of the T. P. Act and as such a registered instrument is not necessary under the law: such a tenancy can be established by verbal settlement: *Giribala Dasi v. Dwaraka Nath Mistri*, 55 C.I.J. 312. The case of *Hasiswari (Kasiswari) v. Haranath*, 40 I.C. 100, which took a different view, was considered in this case.

Lease in respect of agricultural lands: registered instrument if necessary

2. Tenure held since Permanent settlement: Sec. 6 cl. (a) and Sec. 7 :—If a tenure is in existence from the time of the Permanent Settlement, the landlord is entitled to an enhancement of rent under clause (a) of sec. 6 of the Bengal Tenancy Act if he proves that enhancibility is one of the incidents of the tenure, and if there is no contract to regulate the principle on which, or

Tenure in existence from the time of Permanent Settlement: Land

lord, when entitled to enhancement of rent.

Contract between parties regulating principle of enhancement, if to be given effect to.

the amount by which the enhancement is to be given, the case would come within either of the two methods of assessment of rent prescribed in sec. 7 of the Bengal Tenancy Act, notwithstanding the fact that the tenure is in existence from the time of the Permanent Settlement. But, if the tenure has been held from the time of the Permanent Settlement, and if enhancibility is one of the incidents of the said tenure and there is at the same time a contract between the parties regulating the amount of enhancement or the principle of enhancement, that contract must be given effect to, and the two methods of assessment indicated in sec. 7, which section is expressly made subject to any contract between the landlord and the tenant, would not be the proper method to apply: *Sreemanta Narayan Sarkar v. Maharaja Srish Chandra Nandi*, 68 C.L.J. 120.

Onus.

If a tenure is held from the time of the Permanent settlement, its rent cannot be enhanced except as provided by sec. 6 of the B. T. Act. It is for the landlord to prove that he is entitled to enhance the rent payable in respect of the tenure by conditions under which the tenure is held, simply on the finding that the rent was changed once in the year 1818 it cannot be held that the conditions under which the tenure was held, was that the rate of rent payable in respect of the same, is enhancible: *Kumar Manmatha Nath Mitter v. Sarada Prosad Chakravarty*, 58 C.L.J. 157: A.I.R. 1934 Cal. 215.

Counter presumption.

A presumption in favour of landlord under sec. 103 (B) of the B. T. Act arising from the entry in the Settlement Khatian that the rent of the tenure was enhancible, is rebutted by a counter presumption in favour of the tenant from proof of the existence of the tenure from 1818, that the tenure existed at the time of the Permanent settlement. The primary onus on the tenant was shifted on to the landlord by the evidence before the Court as to the existence of the tenure in the year 1818 and by further evidence showing pre-existence of the same: *Ibid*.

Assessment for increase of area, if proves enhancibility.

Where a tenure was held from before the Permanent settlement and there were occasional assessments for increase of area discovered, held, that such assessments for increase of area do not give rise to an inference in law that the landlord has proved the conditions enabling him to enhance the rent: *Maharaja Bir Bikram Kishore Manikya Bahadur v. Ali Ahamad*, 34 C.W.N. 793 (P.C.): 53 C.L.J. 18.

Tenancy heritable and transferable but enhancibility.

Where the tenancy was permanent in so far that so long as the rent was paid regularly the tenant would continue to enjoy the land but there was nothing to show that the rent was fixed though the tenancy was heritable and transferable, held, that these stipulations were not inconsistent with the landlord's right to enhance the rent: *Bhabani Charan Banikya v. Suchitra Baisnabi*, 51 C.L.J. 25.

Permanent tenure-holder liable to enhancement if can grant *mokurari* under tenure

The rent of a permanent tenure-holder may be liable to enhancement, but his power to create a *mokarari* under-tenure is not restricted. For the grant of a permanent *mokarari* lease by a permanent tenure-holder is binding between the parties and signifies that the permanent tenure-holder shall never be able to demand enhanced rent: *Tayefa Khatun Choudhurani v. Surendra Kumar Sen Rai*, 59 Cal. 26: 35 C.W.N. 806: 53 C.L.J. 512.

7. (1) Where the rent of a tenure-holder is liable to enhancement, it may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity.

Limits of
enhance-
ment of
rent of
tenures.

(2) Where no such customary rate exists, it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable.

(3) In determining what is fair and equitable, the Court shall not leave to the tenure-holder as profit less than 10 *per centum* of the balance which remains after deducting from the gross rents payable to him the expenses of collecting them and shall have regard to—

(a) the circumstances under which the tenure was created, for instance, whether the land comprised in the tenure, or a great portion of it, was first brought under cultivation by the agency or at the expense of the tenure-holder or his predecessors in interest, whether any fine or premium was paid on the creation of the tenure, and whether the tenure was originally created at a specially low rent for the purpose of reclamation; and

(b) the improvements, if any, made by the tenure-holder or his predecessors in interest.

(4) If the tenure-holder himself occupies any portion of the land included in the area of his tenure, or has made a grant of any portion of the land either rent-free or at a beneficial rent, a fair and equitable rent shall be calculated for that portion and included in the gross rents aforesaid.

[**Note** :—All the provisions of this Act relating to enhancement of rent have been suspended for a period of 10 years with effect from the 27th August, 1937, see sec. 75A inserted by the Bengal Tenancy (Amendment) Act VI of 1938.]

Headings of Notes.

1. LIABLE TO ENHANCEMENT.
2. CUSTOMARY RATE: SEC. 7 (2).
3. FAIR AND EQUITABLE RENT: SEC. 7 (3).
4. COURT FEES IN SUIT FOR ENHANCEMENT OF TENURE.

Presump-
tion in a
suit for en-
hancement.

Word
"Mokurari",
if should be
used.

"Dharyya",
meaning of.

'Kamī beshī
surat jamī
jama',
meaning of.

'Dharyya':
'Nirikh',
meaning of.

'Nirdharita'
meaning of.

'Dharyya':
'Nirupila':
'Nirikh'
meaning of.

"Mokra",
meaning of.

Stipulation
to pay addi-
tional rent
for excess
area at
Kabuliyat
rate, if
proves fixity
of rent.

I. Liable to enhancement:—*Prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively. It is not necessary that the word "mokurari" should be used in the document provided, the words are there from which an intention to create fixed rent can be gathered: *Panchu Gopal Mukherjee v. Kumar Gocool Chandra Law*, 66 C.L.J. 24. The word "dharyya" means fixed but in the present case it was used simply to differentiate the rent from the new imposition and did not mean fixity of rent: *Ibid*.

Whether the rent is fixed is to be decided on the construction of the terms of the contract itself in each particular case. The words *kamī beshī surat jamī jama* in a *bemeadi* lease had not reference to the land alone but meant that the rent of the tenanted holding would be liable to enhancement or reduction and that the words *dharyya nirikh* in their context could only mean the stipulated rate as fixed by the *kabuliyat* and not fixity of rent: *Lakhan Chandra Mandal v. Narim Sardar*, 36 C.W.N. 341.

Where the land was shown to be full of jungle at the inception of the tenancy and the tenure was a permanent and a heritable one and the word "nirdharita" was frequently used in the patta and *kabuliyat* and it contained a provision for rent regarding excess area held; held, that though the word "mokarari" was not used, the effect of the document was to create a permanent lease at a fixed rent: *Ambika Charan Das v. Basantakumar Mandal*, 58 Cal. 1046: 36 C.W.N. 178.

Where the words "dharyya", "nirupila" and "nirikh" were used in the lease, held upon an interpretation of the terms of the lease that the said words did not prove fixity of rent: *Bahadur Singh Singhee v. Bhupal Chandra Roy Chowdhury*, 67 C.L.J. 512.

The words 'abadharita' and 'dharja' do not by themselves mean fixity of rent in perpetuity but merely mean the rent fixed or settled by the lease: *Jatindra Nath Raha v. Keramatali Sheikh*, 39 C.W.N. 1244.

The word "mokra" is a corruption of the Arabic word "mokarrar", which is derived from the word "karar", meaning agreement. The word "mokarari" or "mokra" in itself does not signify perpetual fixity, but if a document indicates that it is used in place of "mokarari" it should have that significance. There is no presumption that a permanent lease must be at the same time *mokarari*. If sufficient intention is found in the lease, though there is no mention of the word "mokarari" to exclude the landlord's right to enhance the rent, the intention of the parties is to create a *mokarari* lease: *Nabendra Kishore Roy v. Choudhuri Mian*, 52 C.L.J. 583: A.I.R. 1931 Cal. 265.

The stipulation that the tenant would pay additional rent for excess area at the rate (*nirikh*) mentioned in the *kabuliyat* lends considerable support to the view that the intention of the parties is to fix the rent in perpetuity: *Ambika Charan Das v. Basanta Kumar Mandal*, 58 Cal. 1046: 36 C.W.N. 178. See also, *Nabendra Kishore Roy v. Choudhuri Mian*, 52 C.L.J. 583. Such a stipulation is not sufficient or conclusive to prove fixity of rent: *Panchu Gopal Mukherjee v. Kumar Gocool Chandra Law*, 66 C.L.J. 24.

Once it is found that the lands do constitute tenures, sec. 7 must necessarily be attracted if the rent is proved to be enhancible but that must always be subject to a contract between the parties: *Basanta Kumar Dutta v. Sukumari Das Gupta*, A.I.R. 1938 Cal. 442.

In this respect no distinction can be drawn between cases where the tenancy is a permanent tenure and cases where it is only a raiyati one: *Nagendra Mohan Nath v. Jogendra Nath Sen*, 63 C.L.J. 579.

A landlord is entitled to enhance the rents of all rent-paying lands unless he is precluded from doing so by a contract binding on him. Where a tenancy was described as "*kayemi-sikmi taluq*" and there was stipulation in the lease that the landlord would be entitled to sell the tenure twice a year under the *Putni Regulation* (VIII of 1819) and that on excess lands being found or *khila* lands having been brought under cultivation there would be separate assessment in accordance with the rates of the present settlement and on refusal of the tenant to agree to the new settlement the landlord would be entitled to have the rent enhanced or else to take *khas* possession of the lands; *held*, that the lease did not prove that the rent was fixed for ever and the landlord was entitled to enhance the rent: *Amar Kristo Chowdhury v. Surendra Bijoy Dewanji*, A.I.R. 1937 Cal. 148: 171 I.C. 632.

A *patta* contained the words, *thica mokra, mourashi, putra poutradikrame* and also stipulated that the rent will not be remitted on any account; *held*, that the tenure was not only hereditary, to be held from generation to generation, but that the rent also was fixed in perpetuity, and that reading the document as a whole it was a *mokurrari mourashi* lease, and hence the rent could not be enhanced: *Hanuman Das Mundra v. Damodar Laik*, 59 C.L.J. 381: A.I.R. 1934 Cal. 782: 152 I.C. 540.

The word "*Thica*" means a contract by which a person engages to pay a fixed amount of rent or revenue and does not mean temporary—*Ibid*. ‘Thica’, meaning of

Where in an agreement between a landlord and his tenant, the rent payable was fixed at a certain sum in cash and a certain amount of paddy and it was stipulated that the rent would not be altered on any account, *held*, that the tenancy was a tenancy at a rent fixed in perpetuity: *Tofazzal Ahmed Choudhury v. Masalat Khan Choudhury*, 38 C.W.N. 797. Rent payable in cash and paddy.

Where a lease contained a stipulation that "for the two bighas of land I shall deliver to you every year six bishes of paddy; if I do not deliver paddy or keep it in arrears then for the price of the above-mentioned six bishes of paddy you shall be entitled to realise from me with interest at Re. 1/- per Rs. 100/- per month the *ticca* sum of Rs. 20/- either by suit or amicably", *held*, that the *ticca* meant fixed in perpetuity, and the landlord was entitled, in default of delivery of paddy, only to the sum of Rs. 20/-: *Ram Charan Chakravarty v. Raj Kumar Chakravarty*, 61 C.L.J. 351. “Ticca” meaning of.

The *patta* relating to a tenure showed that the land was let out on an annual rent of Rs. 3/- including cess, and stated that "on payment of rent you enjoy and possess (the land) in succession of sons and grandsons downwards. In these terms I execute this *daemi kaemi patta*, etc."; *held*, that the word *daemi kaemi* indicated that the tenancy was a permanent tenancy, and that entry in the ‘Daemi Kaemi’, meaning of.

record-of-rights to the effect that the holding was an occupancy one could not be given effect to since the recitals in the patta lead to the conclusion that it was intended that the tenancy should be permanent. From the recital to the effect, that if the demand by the superior landlord be ever increased, the lessee would be liable to pay proportionate amount, and the possible liability of the tenant to pay an additional amount on the happening of a certain contingency, it cannot be held that the rent should not be fixed: *Surendra Kumar Nandi v. Bepin Chandra Guha*, 38 C.W.N. 1091.

Renewal
clause.

Where a lease was granted for 3 years, and it was provided that at the end of the term the lessee would have the right to take a new settlement of lands covered by the lease as well as any excess land which would come to his possession and it was not stated for what period the new lease would run, *held*, that by the lease the parties intended only one renewal and for the period of 3 years only and as such the lease did not create a permanent tenure. The leaning of the Court is always against perpetual renewals: *Maharaja Srish Chandra Nandi v. Doa Mahammad Byapari*, 68 C.L.J. 128.

Customary
rate,
meaning of.

2. Customary rate: Sec. 7 (2):—In order to entitle the landlord to claim enhancement under sec. 7 he must first prove that there is a customary rate prevailing in the vicinity. If he succeeds in doing so he can then apply to the Court to allow enhancement as it thinks fair and equitable. If there is a customary rate of the *taraf* it means that the rate prevails throughout the estate including the tenures in suit which lie within it: *Kumar Prativanath Roy v. Banomali Sarkar*, 35 C.W.N. 212.

In a suit for enhancement of rent the landlord in his plaint expressly stated that there was no customary rent in the locality and adduced evidence for the purpose of showing the absence of any customary rate. The tenant in his written statement did not challenge this position nor was any evidence adduced on his behalf to rebut the evidence adduced on behalf of the landlord, *held* that under the circumstances it could be taken to be established that there was no customary rate of rent in the locality and as such the Court was at liberty to enhance the rental up to such limit as it thought fair and equitable under sec. 7, cl. (2): *Basanta Kumar Dutta v. Sukumari Das Gupta*, A.I.R. 1938 Cal. 442.

Assets in
kind are to
be determin-
ed on the
basis of the
price of
paddy rent.

3. Fair and equitable rent: Sec. 7 (3):—In a suit for enhancement of rent of a tenure the rent of which is payable in money and in kind, the Court in fixing a fair and equitable rent under sec. 7 of the Bengal Tenancy Act is to determine the assets in kind on the basis of the price of the paddy rent and cannot apply the provisions of sec. 40 of that Act which are applicable only to occupancy raiyats: *Jatindra Nath Raha v. Kali Krishna Ray Chowdhuri*, 37 C.W.N. 1084.

Fees, tolls
realised
from
licensees in
a *hat*, are
not 'rent'.

The term "rent" in sec. 7(3) bears the same sense as it bears in sec. 5 of the Act, *viz.*, whatever is lawfully payable by the "tenant" as defined by the Act. The fees or tolls paid by the sellers or the purchasers in the *hat* held over a portion of the land comprised in the tenure cannot be deemed 'rent'; the persons who come to the *hat* to sell paddy, cloth, curd, salt, or vegetable are licensees—not lessees or tenants. So what is realised from them is

not 'rent' and cannot be taken into account in determining the amount of the 'fair' rent in a suit for enhancement of rent under sec. 7: *Khudan Lal v. Nafizuddin*; A.I.R. 1933 Pat. 36: 142 I.C. 43.

The power of a shebait of an idol to make an alienation is a limited power. Ordinarily a shebait cannot grant a permanent lease at a fixed rent, but he may do so in cases of unavoidable necessity. Where, therefore, the predecessor of the shebait has granted a permanent tenure, even though no justifying necessity like the preservation of the property was proved, the rent under the tenure is liable to enhancement under sec. 7. The Court can in such a case consider the question as to what should be the fair and equitable rent (40 per cent. of the gross collection allowed as fair rent to the landlord): *Hrishikesh Ray v. Upendra Nath Mandal*, A.I.R. 1936 Cal. 432.

Shebait, if can grant permanent lease at a fixed rent.

40 p.c. of gross collection, if fair rent to lord-lord.

There can be no better material in fixing a fair rent than the opinion formed by an expert Revenue Officer who is actually working on the spot: *Khaje Habibulla v. Bepin Chandra*, A.I.R. 1936 Cal. 454.

4. Court Fees in Suit for enhancement of tenure :—A suit for enhancement of the rent of a tenure (there being no prayer for recovery of rent for any period) would be governed by Art. 1 of Sch. I of the Court Fees Act and the court fee payable on the plaint would be on the difference between the rate claimed and the rate paid before and the fee payable on the memorandum of appeal would be on the difference between the rate claimed and the rate allowed by the Court below: *Prasanna Deb Raikat v. Purna Chandra Saha*, 38 C.W.N. 527. Such a suit is not governed by either sec. 7 (i) or sec. 7 (ii) or sec. 7 (iv) (c) or sec. 7 (xi) (b) or sch. II, Art. 11: *Ibid*.

Court fee in suit for enhancement of rent :
tenure :
Art. I Sch. I of the Court Fees Act applies.

A tenure-holder is a tenant within the meaning of sec. 7 (xi) and the word "right of occupancy", used in cl. (b) of that section, is to be understood in the popular and more general sense of a right by virtue of which a tenant remains in actual and physical possession, as it were, of the tenancy and so does not include the rights of a tenure-holder, *Ibid*. A tenure-holder in fact occupying any part of his tenure is included in the term 'having a right of occupancy'. But that would not make him any the less a tenure-holder as would appear from sec. 7, sub-section (4) of the Bengal Tenancy Act which speaks of a tenure-holder himself occupying a portion of the land. *Ibid*.

8. If it thinks that an immediate increase of rent would produce hardship, the Court may direct that the enhancement shall take effect gradually at such times and by such instalments extending over a period not exceeding ten years as the Court may fix in this behalf.

Power to order progressive enhancement.

9. When the rent of a tenure-holder has been enhanced by the Court or by contract, it shall not be again enhanced by the Court during the fifteen years next following the date on which it has been so

Rent once enhanced may not be altered for fifteen years.

enhanced and for the purposes of this section, if an order for gradual enhancement of such rent has been made by a Court in accordance with the provisions of section 8, the full rent fixed by such order shall be deemed to have come into effect from the date of such order.

[**Note** :—See sec. 75A inserted by the B. T. (Amendment) Act VI of 1938 and notes under that section].

Other incidents of tenures. Permanent tenure-holder not liable to ejectment.

Other incidents of tenures.

10. A holder of a permanent tenure shall not be ejected by his landlord except on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected :

Provided that where the contract is made after the commencement of this Act, the condition is consistent with the provisions of this Act.

Proviso to Sec. 10.

Proviso to sec. 10 :—The proviso to sec. 10, Bengal Tenancy Act leaves permanent tenures created before the passing of the Act to the operation of the terms agreed upon between the parties (the grantor and the grantee) irrespective of the general provisions of the Act as regards substantive rights: *Ramchandra Naik v. Ajodhya Singh*, 15 Pat. 8: A.I.R. 1935 Pat. 508: 158 I.C. 399.

Condition in lease before B. T. Act, 1885 for ejectment on default in payment of any instalment of rent, if valid.

The ancestors of the defendants executed a *kabuliyat* in favour of the plaintiff's ancestor and received from him a *patta* in 1872, for a perpetual lease of a village on a fixed rent of Rs. 1,601, a year, payable in four instalments. The *patta* and *kabuliyat* provided, *inter alia* that if the lessees made delay and default in the payment of any instalment as fixed, the lessor would have every right to cancel the lease, dispossess the lessees, settle or manage the *ijara* property in whatever manner he liked and realise the arrears from the person and property of the lessees. The lessees were charged with the care of the boundary limits of the *mouza* and they were further required "by their good treatment and by making settlement" to cultivate the lands and were given the right to keep the increase in the rent roll. They were not to reduce the *raiyyati* rents that had already been fixed, and they had a right to plant trees or lay out gardens or sink wells, etc. The plaintiffs sued the defendants for arrears of rent and for ejectment on the ground that the defendants having defaulted to pay the rent, plaintiffs had a right to determine the lease. No notice was served by the plaintiffs on the defendants as required by sec. 155 of the Bengal Tenancy Act; held (1) that the lease was one falling under the Bengal Tenancy Act and was excluded from Chapter V of the T. P. Act, that the T. P. Act did not apply at all, as the lease was about 10 years prior to the T. P. Act, which was not retrospective; (2) that though the lease was governed by sec. 10 of the Bengal Tenancy Act, notwithstanding the operation of that section, the operation of sec. 155 was

Notice under S. 155, if necessary in such ejectment suit.

not excluded and hence the plaintiffs were not entitled to a decree for ejectment as they had not served the notice required by sec. 155 of the Act, *Ibid*.

11. Every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property.

Transfer and transmission of permanent tenure.

12. (1) A transfer of a permanent tenure by sale, gift or mortgage (other than a transfer by a sale in execution of a decree or by summary sale under any law relating to *patni* or other tenures) can be made only by a registered instrument.

Voluntary transfer of permanent tenure.

(2) A registering officer shall not accept for registration any instrument purporting or operating to transfer by sale, gift or usufructuary mortgage a permanent tenure in favour of any person other than the sole landlord of such tenure unless there is paid to him, in addition to any fees payable under the Act for the time being in force for the registration of documents, a process-fee of the prescribed amount and a fee (hereinafter called "the landlord's fee") of the following amount, namely:—

(a) when rent is payable in respect of the tenure, a fee of two *per centum* on the annual rent of the tenure: provided that no such fee shall be less than one rupee or more than one hundred rupees; and

(b) when rent is not payable in respect of the tenure, a fee of two rupees;

together with the prescribed cost of transmission of the landlord's fee to the landlord.

(3) When any such instrument is admitted to registration, the registering officer shall send to the Collector the landlord's fee, the cost necessary for the transmission of the same and the notice of the transfer in the prescribed form, and the Collector shall cause the fee to be transmitted to, and the notice to be served on, the landlord named in the notice, or his common agent, if any in the prescribed manner.

(4) The landlord's fees or the prescribed cost of transmission payable under this section and under sections 13 and 15 shall be paid to the registering officer or the Court or the Collector, as the case may be, in the prescribed manner.

Decree
against
recorded
tenure-
holders
ignoring
the trans-
ferees, effect
of.

Transfer of Permanent Tenure when complete :—Before the Act of 1885 came into force the duty was laid specifically upon the transferor of a tenure to see that his name was recorded in the landlord's sherista, and it may well have been that, if he failed without good reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect. Instead of the transferee being bound to go to the landlord to get his name recorded, it was provided that a voluntary transfer must be by registered instrument, and that before registration a fee was to be paid by the transferee and notice given by the registration office, through the Collector, to the landlord, or in the case of an execution sale by the executing Court. In this state of the law a landlord cannot ignore transfers of the tenure and rely upon decrees obtained by him against persons whom he chooses for his own purposes still to record as his tenants, though he knows or must be taken to know, that their interest in the tenure has ceased: *Jitendra Nath Ghose v. Monmohon Ghose*, 57 I.A. 214: 34 C.W.N. 821 (P.C.): 52 C.L.J. 272 (P.C.).

Presump-
tion as to
proper statu-
tory notice.

In the case of a transfer of a permanent tenure whether voluntary or in execution of a decree, it will be presumed in the absence of evidence to the contrary that the procedure laid down by secs. 12 and 13 of the Bengal Tenancy Act was duly followed and that proper statutory notice was given, through the Collector, to the landlord.—*Ibid*.

Ekkrar-
nama :
Deed of
gift.

The tenants of a *mokurari* tenure executed registered *ekkrarnamas* in favour of one of them thereby ceasing to have any interest in the tenure and vesting the entire tenure in the tenant in whose favour the deed was executed. He was to be deemed to be the *mokuraridar* and was solely liable for payment of rent of the tenure. No valuable consideration was mentioned in the deed in return for the relinquishment, *held* that the *ekkrarnamas* must be regarded as deeds of transfer in essence and might well be construed to be deeds of gift as no consideration was mentioned in the deed: *Ajodhya Prasad Singh v. Aminuddin Ahmad*, A.I.R. 1935 Pat. 481: 159 I.C. 722.

Transfer of
permanent
tenure by
sale in exe-
cution of
decree other
than decree
for rent.

13. (1) When a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, or when a mortgage of a permanent tenure, other than a usufructuary mortgage thereof, is foreclosed, the Court shall, before confirming the sale under rule 92 of Order XXI in Schedule I to the Code of Civil Procedure, 1908 or making a decree or order absolute for the foreclosure, require the purchaser or mortgagee to pay into Court the landlord's fee required by section 12 together with the prescribed cost of transmission thereof to the landlord, and such further fee for service of notice of the sale or final foreclosure on the landlord as may be prescribed.

(2) When the sale has been confirmed, or the decree or order absolute for the foreclosure has been made, the Court shall send to the Collector the landlord's fee, the prescribed cost of transmission of the same, and a notice of the sale or final foreclosure in the prescribed form, and the Collector shall cause the fee to be transmitted to, and the notice to be served on, the landlord named in the notice or his common agent, if any, in the prescribed manner.

Effect of non-payment of landlord's fee :—The petitioner was the purchaser at a mortgage execution sale of two transferable permanent tenures. The landlords ignored the purchaser and sued the recorded tenants for the rent and purchased the tenures in execution. A portion of the rent sued for accrued due after the purchase by the petitioner. The question was whether the decrees obtained by the landlords were rent decrees or money decrees, *held*, that by virtue of Bengal Tenancy (Amendment) Act I of 1903, mere non-payment of landlord's fee does not invalidate a sale, and that the decree obtained by the landlord was not a rent decree: *Bishnu Charan Pal v. Jogendra Kumar Bhowmik*, 36 C.W.N. 922.

14. (*Transfer of permanent tenure by sale in execution of decree for rent.*) *Rep. in Western Bengal by the Bengal Tenancy (Amendment) Act, 1907 (Ben. Act I of 1907), s. 2; and in Eastern Bengal by the Eastern Bengal and Assam Tenancy (Amendment) Act, 1908 (E. B. & A. Act I of 1908), s. 2.*

15. When a succession to a permanent tenure takes place, the person succeeding shall give notice of the succession to the Collector in the prescribed form, and shall pay to the Collector the prescribed fee for the service of the notice on the landlord and the landlord's fee required by section 12, together with the prescribed cost of transmission thereof to the landlord, and the Collector shall cause the landlord's fee to be transmitted to, and the notice to be served on, the landlord named in the notice, or his common agent, if any, in the prescribed manner:

Succession
to perma-
nent tenure

Provided that where, at the instance of the person succeeding, mutation is made in the rent-roll of the landlord within six months of the succession, the person succeeding shall not be required to give notice under this section.

Omission to notify succession :—The omission to notify succession to the tenure as contemplated by sec. 15 has only the result that a person succeeding to the tenure is not entitled to recover by a suit or any other proceeding any rent payable to him by the subordinate tenants but it does not affect his interest in the

Omission to
notify suc-
cession
effect of.

tenure in any other way. The failure of the heirs to give notice of succession would not, therefore, entitle the landlord to treat some of the heirs as representatives of the other tenants in respect of the tenancy and the decree obtained by him against them could not be regarded as a rent decree: *Haris Chandra Choudhury v. Nishi Kanta Nandy*, 58 C.L.J. 539: A.I.R. 1934 Cal. 292: 149 I.C. 887.

Bar to recovery of rent, pending notice of succession.

16. A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit or other proceeding any rent payable to him as the holder of the tenure, until the duties imposed upon him by section 15 have been performed.

Unregistered successor to a tenure, if can claim rent not as tenure-holder but in some other right.

Unregistered successor to a tenure:—Sec. 16 of the Bengal Tenancy Act bars an unregistered successor to a tenure from recovering rent only when he seeks to do so *qua* such tenure-holder. It does not operate as a bar when the claim is based on a different or an additional right, namely, on a lease which the tenant has taken from him: *Ahammad Mohammad v. Rahimannessa Khatun*, 35 C.W.N. 1260.

Interpretation.

16A. In sections 13, 15 and 16 the words “person succeeding”, “transferee”, “purchaser”, “mortgagee”, and “person becoming entitled to a permanent tenure by succession”, include the successors in interest of such persons but do not include the landlord where he is the sole landlord.

Transfer of, and succession to, share in permanent tenure.

17. Subject to the provisions of section 88 sections 12 to 16A shall apply to the transfer of, or succession to, a share in a permanent tenure.

Share in permanent tenure:—Where a holding was sold in execution of a decree for arrears of rent but it appeared that in the rent suit the transferees of portions of the holding from the original tenants were not impleaded as parties, *held*, that the transferees were necessary parties and that sec. 17 applied even though what was transferred was not an aliquot share but a defined area: *Ramlaik Rai v. Rajba Iam Ri*, A.I.R. 1933 Pat. 581: 147 I.C. 344.

CHAPTER IV.

Raiyats HOLDING AT FIXED RATES.

18. (1) A *raiyyat* holding at a rent, or rate of rent, fixed in perpetuity—

Incidents of holding at fixed rates.

(a) shall be subject to the same provisions with respect to the transfer of, and succession to, his holding as the holder of a permanent tenure,

(b) shall not be ejected by his landlord except on the ground that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected;

(c) shall be deemed to be a settled *raiyyat* of the village if he complies with the conditions set forth in section 20; and

(d) shall be entitled—

(i) to plant,

(ii) to enjoy the flowers, fruits and other products of,

(iii) to fell, and

(iv) to utilise or dispose of the timber of,

any tree on the land comprised in his holding.

(2) The provisions of sections 23A to 38 (both inclusive) shall not apply to *raiyyats* holding at fixed rates, even though such *raiyyats* have a right of occupancy in the lands of their holdings.

I. Sec. 18 Sub-sec. (2):—Sub-sec. (2) of sec. 18 of the Bengal Tenancy Act does not affect sec. 23 of that Act. Under the previous law sec. 23 had no application to tenants holding at a fixed rate of rent and the amended Act of 1928 has made no alteration in that law as regards the applicability or non-applicability of sec. 23: *Shib Chandra Sarkar v. Panchanan Kolay*, 64 C.L.J. 71.

Sec. 23, if applies to raiyats at fixed rates.

2. Fixed rate:—A *patta* was stated to be a *kaemi patta* and when stating the rate of rent it was stated that it was *nirikh* that is to say the rate of rent was fixed, *held*, that since the rate of rent was fixed by the *patta*, a *raiyyati* at a fixed rate was created in favour of the tenants. Under sec. 37 of the Revenue Sale Law raiyats

having a right of occupancy at a fixed rate of rent are not liable to be ejected ; but where the *mokarari* right of such raiyat was created subsequent to the Permanent Settlement, the purchaser at a revenue sale had right to enhance their rent irrespectively of the engagement, and the landlords were entitled to treat such raiyats as occupancy raiyats whose rents were liable to enhancement according to law : *Janaki Nath De Sarkar v. Rajani Nath Kar*, 67 C.L.J. 470.

3. Mokurari :—*See notes under secs. 5 and 7.*

CHAPTER IVA.

PROVISIONS AS TO TRANSFERS OF TENURES AND HOLDINGS AND LANDLORD'S FEES.

18A. Notwithstanding anything contained in section 13 of the Indian Evidence Act, nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, the amount or fixity of rent, the area, the transferability or any incident of any tenure or holding referred to in such instrument.

Saving as to statements in instruments of transfer where landlord is not a party.

Sec. 18A: Rule of Evidence:—Section 18A is a rule of evidence which must necessarily apply to all proceedings taken after it came into force and it is applicable to the recitals in documents, though executed before this provision came into force. Hence recitals in sale-deed are not evidence of title and cannot be used to prove a grant. It is however permissible to use them, not as evidence of grant, but to show the nature of the title that was being asserted and as transactions relevant under sec. 13, Evidence Act, by which a right was claimed or asserted on some past occasion: *Keshva Prasad Singh v. Brahmdev Rai*, 13 Pat. 45: A.I.R. 1933 Pat. 656: 149 I.C. 1177. This decision was under old sec. 18A. The words "notwithstanding anything contained in sec. 13 of the Indian Evidence Act" have been inserted in Bengal by the Amending Act IV of 1928, and these words were not in the old section.

18B. The acceptance by a landlord of the landlord's fee payable under Chapter III or Chapter IV in respect of any tenure or holding shall not operate—

Saving as to acceptance of landlord's fees.

(a) as an admission of the permanence, the amount or fixity of rent, the area, the transferability or any incident of such tenure or holding, or

(b) as an express consent under section 88 to the division of such tenure or holding, or to the distribution of the rent payable in respect thereof.

18C. All landlord's fees and landlord's transfer fees deposited with the Collector before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928, under Chapter III, IV or V and all fees deposited with the Collector under sub-section (1) of section 48H shall, unless accepted or claimed by the

Forfeiture of unclaimed landlord's fees.

landlord within five years from the date of service of notice, be forfeited to the Government to be credited to the District Boards within the respective jurisdictions of which such fees accumulate.

Note.—The words, “*to be credited to the District Boards within the respective jurisdictions of which such fees accumulate*” after the word “Government” have been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937.

CHAPTER V.

OCCUPANCY-*raiyats*.

General.

General.

19. (1) Every *raiyat* who, immediately before the commencement of the Bengal Tenancy (Amendment) Act, 1928, has, by the operation of any enactment by custom or otherwise, a right of occupancy in any land, shall, when that Act comes into force, have a right of occupancy in that land.

Continuance of existing occupancy-rights.

(2) The exclusion from the operation of this Act, by a notification under clause (ii), or clause (iii) of sub-section (3) of section 1, of any area or part of any area referred to in those clauses shall not affect any right, obligation, or liability, previously acquired, incurred or accrued, in reference to such area or part thereof.

20. (1) Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a *raiyat* land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled *raiyat* of that village.

Definition of "settled *raiyat*."

(1A) A person shall be deemed, for the purposes of this section, to have continuously held land in a village, notwithstanding that such village was defined, surveyed and recorded as, or declared to constitute a village at a date subsequent to the commencement of the said period of twelve years.

(2) A person shall be deemed, for the purposes of this section, to have continuously held land in a village notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed, for the purposes of this section, to have held as a *raiyat* any land held as a *raiyat* by a person whose heir he is.

(4) Land held by two or more co-sharers as a *raiyati* holding shall be deemed, for the purposes of this section, to have been held at a *raiyat* by each such co-sharer.

(5) A person shall continue to be a settled *raiyyat* of a village as long as he holds any land as a *raiyyat* in that village and for one year thereafter.

(6) If a *raiyyat* recovers possession of land under section 87, he shall be deemed to have continued to be a settled *raiyyat* notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a *raiyyat*, it shall as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a *raiyyat*.

Headings of Notes.

1. SUB-SECTION (1).
2. SUB-SECTION (1A).
3. SUB-SECTION (5).
4. SERVICE TENURE.
5. ZIRAT.

Occupancy
right in
undivided
share in
land.

I. Sub-section (1):—Under the Bengal Tenancy Act, even before the amendment of 1928, a tenant holding undivided shares in parcels of land would be a *raiyyat*, and could be a settled *raiyyat* of a village by reason of occupation of such lands for a period of twelve years, for sec. 20 of the Act requires that the tenant should be a *raiyyat* and must hold the land as such continuously for twelve years: *Sripati Charan De v. Kailash Chandra Jana*, A.I.R. 1936 Cal. 331.

In a suit to restrain the defendants from fishing on plaintiff's waters, the defendants pleaded that they had been so fishing from time immemorial on payment of a fee to the landlord per head of fishermen employed, and that they had acquired the status of settled *raiyyats*, *held*, that such a tenancy was unknown to the law and there was no evidence to support a grant, which implied a definite body of men in whose favour, and definite terms on which, it was made: *Brajendra Kishore Roy Chowdhury v. Bama Charan Kaivarta*, 37 C.W.N. 18.

2. Sub-section (1A): Retrospectivity:—Sec. 20, sub-sec. (1A), introduced by the amendment of 1925 is retrospective to this extent that it will apply to cases where 12 years possession of land was completed before the amendment coming into force, but it is not retrospective so as to affect suits ending at the time the said Amending Act was passed: *Kanak Kanti Ray v. Kripanath Gain*, 58 Cal. 817: 35 C.W.N. 125: 52 C.L.J. 597: see also *Kinu Gazi v. Kiran Bala Debi*, 60 Cal. 990: 27 C.W.N. 506.

3. Sub-section (5):—Under sec. 20 sub-sec. (5) of the Bengal Tenancy Act an occupancy *raiyyat* whose agricultural holding in the village is sold up for arrears of rent, leaving no other land for him, except his homestead land in the village, ceases to be a

settled raiyat of the village one year after the sale of the holding. If after such expiry of one year, the landlord again settles the land on the raiyat by a *kabuliyat* for a term of years, the raiyat is liable to be ejected from the land in question on the expiry of the term of the lease under sec. 44 (c) : *Bishnath Singh v. Mt. Bibi Ayesha*, A.I.R. 1930 Pat. 224 : 120 I.C. 477.

4. Service tenure :—A raiyat is not disabled by sec. 181 of the Bengal Tenancy Act from acquiring rights of occupancy under secs. 20 and 21 by reason of the fact that his landlord is tenure-holder whose tenure is a service tenure and so liable to resumption : *Anup Mahto v. Mita Duşodh*, 61 I.A. 93 : 38 C.W.N. 365 (P.C.) : 59 C.L.J. 147 (P.C.).

5. Zirat :—Land let for cultivation—Restrictive provisions—Zirat—Proprietor's Bakasht—Acquisition of right of occupancy in such land : *Radhakrishna Thakurji v. Raghunandan Sinha*, 62 I.A. 64. See notes under sec. 116.

21. (1) Every person, who is a settled *raiyyat* of a village within the meaning of section 20, shall have a right of occupancy in all land for the time being held by him as a *raiyyat* in that village.

Settled
raiyyats to
have occu-
pancy
rights.

(2) Every person who, being a settled *raiyyat* of a village within the meaning of section 20, held land as a *raiyyat* in that village at any time between the second day of March, 1883, and the commencement of this Act, shall be deemed to have acquired a right of occupancy in that land under the law then in force; but nothing in this sub-section shall affect any decree or order passed by a Court before the commencement of this Act.

Right of occupancy :—The B. T. Act, in dealing with the acquisition of occupancy rights was intended to apply to the ordinary agricultural relationship of zemindars, tenure-holders and raiyats under them. If a zemindar brings a settled raiyat on waste land and gives him an interest in that land for the purpose of cultivation for however short a time, and even if the crop to be cultivated be of a limited kind, the provision of sec. 21 of the Act might apply so as to enable the raiyat to acquire occupancy-rights in that land. But when a Railway Company in possession of lands entrusted to them by Government enters into a special agreement with a person and brings him on the land normally held by them for railway purposes, for cultivating it and growing a special crop for a very short and specified term, the company themselves having no power to grant a lease or tenancy, the contract or agreement is one which was never contemplated by the Bengal Tenancy Act. The agreement or arrangement is taken out of the operation of the Act and no occupancy rights are acquired in that land, though the cultivator to whom the lands are let happens to be a settled raiyat of the village in which the lands are situated : *Bengal North Western Railway Co. Ltd. v. Janki Prasad*, A.I.R. 1936 Pat. 362 : 163 I.C. 525.

Thikadar.

Occupancy right cannot be acquired by *thikadar*, *Bechu Singh v. Kumar Kamakhyanarain Singh*, 36 C.W.N. 626 (P.C.): 55 C.L.J. 487. See notes under sec. 22.

Where a mortgagee in possession gave a lease of the mortgaged property to the defendant after institution of suit for redemption and the defendant was in actual possession of the land till the mortgage was redeemed, *held* that he was not liable to be ejected as he had acquired occupancy right under sec. 21 of the B. T. Act: *Pramatha Nath Bhattacharjee v. Sashi Bhusan Banerjee*, I.L.R. [1937] 2 Cal. 181: A.I.R. 1937 Cal. 763.

The usufructuary mortgagee of a village made a raiyati settlement of a portion of land with the defendants at an annual rent of Rs. 670. Two years after the defendants were in occupation of the land as raiyats, the mortgagor redeemed four annas share in the village. Thereupon, the defendants agreed with the mortgagor to pay him an annual rent of Rs. 433 for his one-fourth share. On a suit by the mortgagor for the arrears of rent against the defendants; *held*, that when the mortgagee in possession who was then the *de facto* landlord of the village gave tenancy to the defendants as settled raiyats of the village, the raiyats acquired occupancy rights by operation of law under sec. 21, Bengal Tenancy Act. The subsequent agreement with the mortgagor which had the effect of enhancing the rent from Rs. 670 to Rs. 985 was void by virtue of sec. 29 of the Act and could not therefore be enforced: *Dwarkanath Prasad v. Parmeshwari Rai*, A.I.R. 1937 Pat. 541: 171 I.C. 425.

Effect of
acquisition
of occu-
pancy-right
by landlord.

22. (1) When the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder and the entire interests of the landlord and the *raiyyat* in the holding become united in the same person by transfer, succession or in any other way whatsoever, such person shall have no right to hold the land as a *raiyyat*, but shall hold it as a proprietor or a permanent tenure-holder, as the case may be, but nothing in this sub-section shall prejudicially affect the rights of any third person.

(2) Nothing in this section shall prevent the acquisition by transfer, succession or in any other way whatsoever, of the holding of an occupancy-*raiyyat* or share or portion thereof, together with the occupancy rights therein by a person who is, or becomes, jointly interested in the lands as a proprietor or a permanent tenure-holder:

Provided that a co-sharer landlord who purchases a holding of a *raiyyat* at a sale in execution of a rent decree or of a certificate under this Act shall not hold the land comprised in such holding as a *raiyyat* but shall hold the land as a proprietor or tenure-holder, as the case may be, and shall pay to his co-sharers a fair and equitable sum for the use and occupation of

the same. The rent payable by the *raiyyat* to the other co-sharer landlords at the time of the transfer shall be regarded as the fair and equitable sum until otherwise determined in accordance with the principles of this Act regulating the enhancement or reduction of the rents of occupancy-*raiyyats*.

(3) A person holding land as a temporary tenure-holder or farmer of rents shall not, while so holding, acquire a right to hold as a *raiyyat* any land comprised in his temporary tenure or farm.

Explanation.—A person having a right to hold the lands of an occupancy holding as a *raiyyat* does not lose it by subsequently holding the land as a temporary tenure-holder or farmer of rents.

Headings of Notes.

1. SUB-SECS. (1) AND (2).
2. APPLICABILITY OF THE SECTION TO TRANSFERABLE OCCUPANCY HOLDINGS.
3. SUB-SEC. (3).
4. MERGER.

I. Sub-secs. (1) and (2):—Sub-sec. (1) and sub-sec. (2) of sec. 22 of the Bengal Tenancy Act, as it stood before its amendment by Bengal Act IV of 1928, must be read together and the transfer contemplated by sub-sec. (2) includes succession. Sec. 22 applies to the case of a succession by the law of inheritance to a non-transferable occupancy holding. Where a co-sharer landlord of an occupancy holding succeeded by the law of inheritance to a non-transferable occupancy holding, *held*, that he had no right to hold the land as an occupancy raiyat: *Radhagobinda Bishayee v. Jnanendra Chandra Kundu*, 42 C.W.N. 495.

Where a co-sharer landlord purchased a raiyati holding before amendment of sec. 22 (2) by Act I (E. B. A.) of 1908 only the occupancy right therein was extinguished but not the holding itself. The said amendment not being retrospective in operation, the same position continued thereafter in regard to the holding so purchased: *Abhoj Charan Modak v. Rani Sundar Saha*, 33 C.W.N. 1081: See also *Gorai Molla v. Panchu Haldar*, 57 Cal. 750: 34 C.W.N. 51: 51 C.L.J. 193.

The effect of sec. 22 of the B. T. Act as it stood after amendment by Act I (E. B. and Assam) of 1908 is that when the superior landlord purchases an occupancy holding under him, the holding itself disappears. Consequently, the status of an under-raiyat holding under the occupancy raiyat is raised to that of the raiyat: *Ram Charan Sutradhar v. Makhani*, 38 C.W.N. 976.

A purchase by a co-sharer landlord of non-transferable occupancy holding in respect of which he is a co-sharer landlord, entitles his co-sharers to treat the holding as abandoned and to take *khas* possession of it to the extent of their shares: *Golam Nabi Mridha v. Joytun Bibi*, 57 C.L.J. 208; A.I.R. 1933 Cal. 775; 150 I.C. 260,

Sub-sec (2) before amendment of 1928: 'Transfer' in sub-sec. (2), if includes succession.

Sec. 22 (2) before amendment by Act I (E.B.A.) of 1908.

Sec. 22 (2) after amendment by Act I (E.B.A.) of 1908.

Purchase by co-sharer landlord of his share in non-transferable occupancy holding.

The purchase by a co-sharer landlord of a non-transferable holding is valid to the extent of his interest ; but he cannot force the purchase on his co-proprietors. The latter may therefore treat him as a trespasser : *Dhanpat Sahu v. Deocharan Barhi*, 153 I.C. 243.

Sec. 22 applying obviously to the case of a transferable holding without the consent of the landlords would also apply to those cases in which the landlords had given their consent ; that is to say, the purchase by the co-sharer landlord of a holding of one of the tenants with the consent of his co-sharers would place the purchaser co-sharer landlord in the position provided for by sec. 22 (2), B. T. Act : *Naga Rai v. Buchi Rai*, A.I.R. 1936 Pat. 285 ; 162 I.C. 875.

Compensation for use and occupation : Limitation.

Art. 120 of the Limitation Act applies to a suit for compensation for use and occupation for which a co-sharer landlord in possession of lands is liable to the other co-sharers under sec. 22 of the Bengal Tenancy Act : *Suresh Chandra Nag v. Kumud Kamal Nag*, 41 C.W.N. 1090.

Partition of holding amongst co-sharers, effect of.

Sec. 22(2) of the Bengal Tenancy Act does not disentitle a co-proprietor to hold *raiyati* lands purchased by him in rent executions subject to the payment of rent under the clause after he has ceased to be a co-proprietor by reason of a partition of the holding among co-sharers. Undue stress should not be laid on the word 'co-proprietor' in sec. 22(2). The words 'subject to the provisions of sec. 22 (2)' occurring in sec. 158-B of the Act, do not really introduce any new consideration, but only take one back to sec. 22. It is not correct or justifiable to read into the affirmative proposition contained in sec. 22 (2) a negative provision that the purchasing co-sharer, will have no right at all to the land as soon as he ceases to be a co-sharer by reason of the partition. It is only as long as there are others interested in the land as co-proprietors that it is necessary to deal with specifically with the purchasing co-sharer's right to hold the land. The partition does not put an end to the right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself, but the rent that would have been paid for the land by the occupancy raiyats whose place has been taken by the purchasing co-proprietor. The result is that the latter becomes liable to the other co-sharers until partition for a proportionate share of the rent ; and these rents and not the land purchased by him would be taken into account in the partition : *Dhaneshwar Kuer v. Chandradhari Singh*, A.I.R. 1936 Pat. 317 ; 162 I.C. 820.

If a *jote*, acquired by a co-sharer of a *taluk* before the amended Bengal Tenancy Act, be larger in area than his *taluk*, it cannot be taken notice of in a partition of the *taluk* in the absence of recognition by the other co-sharers, and huts belonging to such co-sharer and standing on a portion of the *jote* outside his own allotment in the *taluk* are removable by way of delivery of possession to the co-sharer to whom such portion has been allotted by the final partition decree : *Shah Abdul Hamid v. Prokash Chandra Nandi*, 38 C.W.N. 832.

The purchase by a co-sharer landlord of a non-transferable occupancy holding is valid as against every person except the other co-sharer landlords, consequently, a suit to eject a trespasser by such

co-sharer landlord purchaser is maintainable: *Haji Nayeali Sheikh v. Lalit Mohan Roy*, 38 C.W.N. 1126.

Although a certain co-sharer landlord may have certain lands of *mehal* in his sole possession, he is, in the absence of acquiescence, entitled to joint possession of a non-transferable occupancy holding with a person who took possession by purchasing it from the previous tenant as a stranger and then acquired a fractional share of the superior interest, thus becoming a co-sharer landlord: *Sarat Chandra Saha v. Bepin Behari Chakerbutty*, 37 C.W.N. 256.

2. Applicability of the section to transferable occupancy holdings:—Sec. 22(2) applies only to transferable occupancy holdings: *Hulas Narayan Mahto v. Khub Lal Mahto*, A.I.R. 1933 Pat. 588: 147 I.C. 261.

Occupancy holdings are now transferable by statute, see s. 26B.

3. Sub-sec. (3):—During the period of the lease, a *thikadar* stands in the same place as a landlord for the period and is the landlord of the raiyat; as such he can consent to the transfer of a non-transferable occupancy right and can consent to a transfer to himself. When he takes a transfer to himself he must be deemed to have consented to it. When the occupancy right is so vested in him, he can deal with it as he likes and his dedication of the property in favour of an idol is perfectly valid and is not affected by a *kabuliyat* subsequently executed by him to the landlord: *Satyanarain Sami v. Jamuna Bai*, 14 Pat. 294: A.I.R. 1935 Pat. 133: 155 I.C. 834. Thikadar.

Sec. 22 (3), if applies to transfer by *thikadar* himself and recognition of transferee, see *Sri Chandra Churdeo v. Laldhari Prasad Singh*, 37 C.W.N. 98 (P.C.): 56 C.L.J. 360.

A *thikadar* cannot acquire occupancy right: *Bechu Singh v. Kumar Kamakhya Narain Singh*, 36 C.W.N. 626 (P.C.): 55 C.L.J. 487.

4. Merger:—Apart from sec. 22, Bengal Tenancy Act, there is no general law of merger applicable to agricultural tenancies in this country, and though the principle of English Common Law was inflexible and applied irrespective of the intention of parties, in equity it always depended upon circumstances and was governed by the intention of parties. Apart from sec. 22 there is no law of merger regarding agricultural tenancies in this country.

Sec. 22 of the Bengal Tenancy Act presupposes the existence of superior interest as a separate entity before the act of transfer or succession would effect a merger. In other words, the two interests must have separate existence before the question of merger can come in. When the immediate landlord creates an intermediate tenancy right between him and the actual raiyat there would not be a merger under sec. 22 of the Bengal Tenancy Act, simply because the intermediate tenant happens to be a raiyat: *Sashi Kumar Majumdar v. Golap Banu*, I.L.R. [1937] 1 Cal. 679: A.I.R. 1937 Cal. 669.

When the proprietor of an estate grants a permanent lease by way of *mokurari* to the occupancy raiyat thereof, such grant has not the effect of extinguishing the right of occupancy possessed by the raiyat and so render him liable to eviction. There is no merger of rights in such a case: *Kali Singh v. Matru Singh*, 15 Pat. 584. Mokurari right to occupancy raiyat, if there is merger.

No merger when co-sharer landlord purchases occupancy holding.

Where a co-sharer landlord purchases an occupancy holding a merger does not ensue: *Bajinath Prasad Singh v. Muneshwar Singh*, A.I.R. 1936 Pat. 63 : 160 I.C. 1066.

Incidents of Occupancy-right.

Incidents of occupancy-right.

Rights of raiyat in respect of use of land.

23. When a *raiya*t has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy.

Trees :—See notes under sec. 23A.

Tenancy for horticultural purposes—Sub-lessee under occupancy raiyat erecting structure thereon.

Where a sub-lessee under an occupancy raiyat has raised structures on the land of the tenancy which was for horticultural purposes, but in a suit against the raiyat and the sub-lessee, the landlord's right to question the construction of the structure has been held to be barred by limitation, reconstruction of the structure by a transferee from the tenant after the original tenant has been partially burnt down is protected by the previous decree when no fresh use of the land for horticultural purposes has intervened: *Bhupendra Nath Chatterjee v. Trinayani Debi*, 42 C.W.N. 758.

As to whether sec. 23 is applicable to raiyats holding at fixed rate, see *Shib Chandra Sarkar v. Panchanan Koley*, 64 C.L.J. 71. See notes under s. 18.

Rights of occupancy raiyat and landlord in trees.

23A. Subject to the provisions of section 23, when a *raiya*t has a right of occupancy in respect of any land, he shall be entitled—

- (i) to plant,
- (ii) to enjoy the flowers, fruits and other products of,
- (iii) to fell, and
- (iv) to utilise or dispose of the timber of, any tree on such land.

Imposition of *falkar* on trees existing at inception of occupancy holding as part of rent, if barred by Sec. 23A and 178 (h).

I. Falkar on Trees existing at inception of occupancy holding :—The imposition of *falkar* on the trees standing on an occupancy holding at the inception of the tenancy, as a part of the consideration for the use and occupation of the demised land, is not unlawful and is not prohibited by secs. 23A and 178 (h) of the Bengal Tenancy Act. In such circumstances, the *falkar* is not an *abwab*. If the tenant has all along paid *falkar* but his case be that certain or none of the trees were on the holding at the inception of the tenancy but have been planted by him, the onus lies on him to prove the fact. The tenant, may, however, fell the trees on which *falkar* was assessed, provided he does not thereby materially impair the value of the land or render it unfit for the purpose of the tenancy, and thus avoid the payment of *falkar*: *Manager, Murshidabad Estate v. Hira Bewa*, I.L.R. [1937] 1 Cal. 491 : 41 C.W.N. 88 : A.I.R. 1937 Cal. 51.

2. Rights in trees if restricted by sec. 23 :—The right of a raiyat to fell and appropriate trees under sec. 23A of the B. T. Act is subject to the provisions of sec. 23. An occupancy raiyat's right to fell and appropriate trees is not unrestricted. If the act of the raiyat impairs the value of the holding, he is liable in damages to the landlord : *Tarini Prasad Mitra v. Rakhal Chandra Manna*, 39 C.W.N. 459.

Right of occupancy raiyat to fell and appropriate trees, if restricted by Sec. 23.

24. An occupancy-raiyat shall pay rent for his holding at fair and equitable rates.

Obligation of occupancy raiyat to pay rent.

1. Fair and equitable rent :—The general liability of an occupancy raiyat to pay fair and equitable rent will accrue against the *utbandi* tenant as soon as he has acquired such right and a suit under sec. 24 will be maintainable. When, however, a suit is brought not under sec. 24 but for an agreed rent the claim for a fair and equitable rent payable by the *utbandi* tenant as an occupancy raiyat cannot be considered : *Nafar Chandra Pal Chowdhury v. Jalindra Nath Das*, 57 Cal. 582 : 34 C.W.N. 127 : 50 C.L.J. 294. See notes under sec. 180.

Where the plaintiff comes to Court with the allegation that there is an existing rent or rate of rent and fails to prove it he can only be given a decree at the rate admitted by the defendant although the Court may not be satisfied that that is the proper rate : *Bisheswar Singh v. Palan Mahton*, A.I.R. 1930 Pat. 485 : 123 I.C. 615.

2. Rent-free title :—See notes under the heading no. 3 "*Lakheraj and Nishkar*" at p. 22.

3. Suit for assessment of rent :—See notes under sec. 52.

25. An occupancy-raiyat shall not be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground—

Protection from eviction except on specified grounds.

(a) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or

(b) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected.

1. Unfit for the purposes of the tenancy :—The erection of a mosque on land comprised within a tenancy originally created for the purpose of agriculture is not permissible and would be a good ground for ejectment : *Srish Chandra Ganguly v. Esom Mussalli*, 61 Cal. 75 : 38 C.W.N. 93 : A.I.R. 1934 Cal. 280 : 149 I.C. 1072.

Erection of mosque, if ground of ejectment.

2. Breach of condition :—In view of the express provisions laid down in sec. 25, it is doubtful if the breach of an implied covenant would be a ground for ejecting an occupancy raiyat. Such ejectment for breach of implied covenant has always been limited to

Breach of condition.

cases where there has been estoppel by record or where there has been an attempt by the tenant to assert a title paramount to the landlord either in himself or a third person: *Golam Mustapha v. Hanumandas Mundra*, 61 Cal. 937: A.I.R. 1935 Cal. 80: 155 I.C. 321.

On a plain reading of section 25, read with section 155, the landlord has got no absolute right of ejectment, whether the misuse or breach is remediable or not. Sec. 155 (a) clearly indicates that the decree cannot be executed if compensation is paid. If the misuse is remediable, it must be remedied also. Paying of compensation is essential in every case, whether the misuse or breach is remediable or not: *Bibi Saida v. Dukhi Gope*, 14 Pat. 279: A.I.R. 1935 Pat. 422: 159 I.C. 163.

3. Decree against recorded tenant:—The unrecognised transferee of a portion of an occupancy holding has undoubtedly a right to get a decree obtained against the recorded tenant set aside on the ground that it was vitiated by fraud or collusion; but it is not open to him to attack the decree simply on the ground that the decree is wrong in law and should not have been passed having regard to the evidence that was adduced in the case or the provisions of law which were applicable to the facts: *Barkatulla Sheikh v. Jnanendra Chandra Ghosh*, 175 I.C. 731: A.I.R. 1938 Cal. 281.

Devolution
of occu-
pancy-right
on death.

26. If a *raiyyat* dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immovable property: provided that in any case in which under the law of inheritance to which the *raiyyat* is subject his other property goes to the Crown, his right of occupancy shall be extinguished.

1. Right to bequeath:—An occupancy right is a right of property and is devisable by will. The B. T. Act cannot be taken to prohibit such transfers merely because it is silent on the point: *Shreehari Das v. Adwaita Chandra Mandal*, 60 Cal. 1115: 38 C.W.N. 96: A.I.R. 1933 Cal. 908: 147 I.C. 727.

An occupancy *raiyyat* has now got the right to bequeath by statute, see sec. 26B.

2. Reversion to landlord:—When one of several occupancy *raiyyats* dies without leaving any heir and his other properties go by escheat to the Crown the occupancy right in the holding is extinguished to the extent of the share of such *raiyyat* and the landlord is entitled to take possession of such share of the holding: *Trailokya Nath Pal v. Ambica Charan De*, 41 C.W.N. 1148: 67 C.L.J. 55. The principle of joint tenancy with its incidents of rights by survivorship is not the rule of this country. The death of one of the tenants would not have the effect of enlarging the rights of the surviving tenant. *Ibid.*

On the death of a last tenant without leaving any heir to the holding, the occupancy right is terminated and the holding reverts to the landlord, but subject only to any mortgage created by the operation of sec. 171: *Mahomed Zakaria v. Mahomed Nurul Haque*, A.I.R. 1934 Pat. 88: 154 I.C. 193.

A usufructuary mortgage under a mortgage created by the widow of the last male holder of the occupancy holding is entitled to possession of the holding as against the landlord when the holding reverts to the landlord for want of heirs provided that the holding was transferable by custom and the alienation was for legal necessity : *Prasad Nath Jogi v. Ambika Prasad Singh*, A.I.R. 1930 Pat. 407 : 117 I.C. 630.

26A. (*Application of sections 26B to 26J*).
Repealed by the Bengal Tenancy (Amendment) Act 1938 (Beng. Act VI of 1938, s. 3).

Sec. 26A which was inserted by the Amending Act of 1928 was as follows:—"The provisions of sections 26B to 26J shall apply to all transfers of holdings or portions or shares of holdings of occupancy-raiyats and the occupancy rights therein made after the 1st day of April, 1929."

Object of Repeal:—The Revenue Minister in moving an amendment for repeal of sec. 26A said: "It is unnecessary now to have this section 26A. It refers to occupancy rights made after the 1st April, 1929, so it is unnecessary now. It was only to point out that it referred to occupancy raiyatis created after the 1st of April, 1929. Those sections have now been deleted, so I do not think it necessary."

26B. The holding of an occupancy-*raiyat* or a share or a portion thereof, together with the right of occupancy therein, shall, subject to the provisions of this Act, be capable of being transferred in the same manner and to the same extent as other immovable property.

Holdings of occupancy-raiyats with occupancy-rights transferable.

Old.

26C. (1) Every transfer shall be made by registered instrument, except in the case of a bequest or a sale in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913.

(2) A registering officer shall not accept for registration any such instrument unless the sale price or where there is no sale

New.

26C. (1) Every transfer shall be made by registered instrument, except in the cases of a bequest or a sale in execution of a decree or of a certificate signed under the Bengal Public Demands Recovery Act, 1913; and a registering officer shall not accept for registration any such instrument unless the sale price, or where there is no

Manner of transfer and notice to landlord.

Manner of transfer and notices to land-lord and co-sharers.

Old.

price, the value of each holding, portion or share thereof, is stated separately in the instrument and unless it is accompanied by—

- (a) a notice giving particulars of the transfer in the prescribed form;
- (b) the process fee prescribed for the service of such notice on the landlord or his common agent, if any;
- (c) a fee (hereinafter referred to "as the landlord's transfer fee") of the amount provided by section 26D; and
- (d) the prescribed cost of transmission of the landlord's transfer fee to the landlord or his common agent, if any.

(3) When any such instrument is admitted to registration, the registering officer shall send to the Collector the landlord's transfer fee, the prescribed cost of transmission thereof and the notice of the transfer in the prescribed form, and the Collector shall cause the landlord's transfer fee to be transmitted to, and the notice to be served on, the land-

New.

sale price, the value of the holding or portion or share thereof transferred is stated therein, and unless it is accompanied by—

- (i) a notice giving particulars of the transfer in the prescribed form, together with the process fee prescribed for the service thereof on the landlord or landlords or their common agent, if any, who is or are not party or parties to the transfer, and
- (ii) such notices and process fees as may be required by subsection (4).

(2) In the case of a bequest of such a holding or portion or share thereof, no Court shall grant probate or letters of administration until the applicant files a notice and deposits a process fee similar to those referred to in clause (i) of subsection (1).

(3) A Court or Revenue-officer shall not confirm the sale of such a holding or portion or share thereof put to sale in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913, and no Court

Old.

lord named in the notice or his common agent, if any, in the prescribed manner :

Provided that where there is no common agent, a co-sharer landlord may draw his proportionate share of landlord's transfer fee by an application to the Collector, accompanied by copies of extracts from the intermediate register maintained by the Collector under section 4 of the Land Registration Act, 1876, or copies of finally published record-of-rights under Chapter X of this Act, or any other document showing the share and title of the applicant :

Provided also that when a sole landlord purchases a holding or a share or a portion thereof, no deposit of landlord's transfer fee need be made and no notice need be served. And when a co-sharer landlord purchases a holding or a share or a portion thereof and his share is specified in the instrument of transfer, he shall deposit only the amount of landlord's transfer fee proportionate to the share or shares of the remaining co-sharers.

(4) In the case of a bequest, the Court shall, before granting probate or letters of adminis-

New.

shall make a decree or order absolute for foreclosure of a mortgage of such a holding or portion or share thereof, until the purchaser or the mortgagee, as the case may be, files a notice or notices and deposits a process fee or fees similar to those referred to in sub-section (1).

(4) If the transfer of a portion or share of such a holding be one to which the provisions of sub-section (1) of section 26F apply, there shall be filed notices giving particulars of the transfer in the prescribed form together with process fees prescribed for the service thereof on all the co-sharer tenants of the said holding who are not parties to the transfer.

(5) The Court, Revenue-officer or registering officer, as the case may be, shall serve the notices provided in this section by registered post, and after receipt of such notice, the landlord or landlord's agent, as the case may be, shall not refuse to recognise the transferee as the tenant in respect of the holding or portion or share thereof transferred nor omit to enter the transferee's name in the landlord's rent-roll in place of that of the transferor or where

Old.

tration, require the applicant to file a notice giving particulars of the transfer in the prescribed form and to deposit a process fee of the prescribed amount, and the landlord's transfer fee provided by section 26D, together with the prescribed cost of transmission thereof to the landlord or his common agent, if any.

(5) When probate or letters of administration have been granted, the Court shall send to the Collector the landlord's transfer fee, the prescribed cost of transmission thereof and the notice in the prescribed form, and the Collector shall cause the fee to be transmitted to, and the notice to be served on, the landlord named in the notice or his common agent, if any, in the prescribed manner.

(6) Any sum payable at the date of the transfer as an arrear of rent of the holding, or on account of a mortgage of the holding, or portion or share thereof, which the transferee has paid or agreed to pay in satisfaction of the sale price wholly or in part shall be entered in the instrument of transfer, and such sum shall, as set forth in the instrument, be deemed to be the

New.

only a share or a portion of the transferor's interest has been transferred, along with the name of the transferor:

Provided that such recognition shall not operate as an admission of the amount of rent or the area or any incident of such occupancy holding other than the existence of a right of occupancy therein or be deemed to constitute an express consent of the landlord to the division of the holding or to the distribution of the rent payable in respect thereof:

Provided further that if a transfer is subsequently set aside or modified by a competent authority, the party in whose favour such order has been made shall, unless such order has been passed in a suit, appeal or other proceedings to which the landlord was a party, deposit with the authority before whom the appropriate suit or proceeding was first initiated the prescribed fee for a notice on the landlord or his common agent, if any, describing the modifications made by such order, on receipt of which notice the landlord shall cause his rent-roll to be corrected accordingly.

Old.

consideration money or part thereof, as the case may be, for the purposes of sections 26D and 26F.

(7) The landlord's transfer fee and the cost of transmission payable under this section or under section 26E shall be paid to the registering officer or the Court, as the case may be, in the prescribed manner.

New.

(6) In this section—

- (a) 'transferee', 'purchaser' and 'mortgagee' include their successors in interest,
- (b) 'transfer' does not include partition or a lease, or, until a decree or order absolute for foreclosure is made, simple or usufructuary mortgage or mortgage by conditional sale, and
- (c) 'transferor' includes a person whose interest in a holding or portion or share thereof has terminated in the circumstances mentioned in sub-section (2) or sub-section (3).

1. Amendment :—*New Sec. 26C was substituted for old Act VI of Sec. 26C by the B. T. (Amendment) Act VI of 1938, s. 4. 1938.*

2. Object of Amendment :—The amendment was rendered necessary in view of the repeal of secs. 26D and 26E and the substitution of the new sec. 26F for the old sec. 26F. *See notes under sec. 26F.*

3. Bengal Tenancy Ordinance, 1938 :—The Ordinance was promulgated with reference to the provisions of sub-secs. (2) and (4) of old sec. 26C and sub-section (3) of sec. 26E. *As to the object and effect of this Ordinance, see notes under heading no. 3—"Bengal Tenancy Ordinance No. 1 of 1938," ante, under the preamble at page 5.*

4. Effect of the Ordinance and new sec. 26C :—As to whether landlord's transfer fees would be required in the cases of transfer by private sales, the documents of which were executed before or after the 31st May, 1938, but are presented for registration after the B. T. (Amendment) Act VII of 1938 came into force, *see notes under the heading no. 3 "Bengal Tenancy Ordinance No. 1 of 1938", ante, under the preamble at pages 6 to 8.*

(Case-law under old sec. 26C)

Transfer complete on registration.

1. Transfer when complete :—As soon as the document by which an occupancy tenant transfers his holding is registered, the title to the holding passes from the transferor to the transferee with retrospective effect from the date of the execution of the deed of conveyance. The question whether the landlord is served with the notice of transfer or whether he receives the transfer fee or not is not material. The transfer is complete even as against the landlord even if he receives the notice of transfer and his fees only later on : *Maharaj Bahadur Sing v. Nari Mollani*, 63 Cal. 1117 : 40 C.W.N. 683.

Value of holding :
Price of trees, if included.
Trees on holding, if constitute encumbrance within the meaning of Sec. 26F.

2. "Value of holding" :—Although the value of the holding would ordinarily include the value of all things that are appurtenant to it, where notice under sec. 26C of the B. T. Act does not include the price of trees, the landlord cannot be compelled to deposit the price of trees also, in order to pre-empt under cl. (2) of sec. 26F of the Act : *Raj Ballabh Mandal v. Rajendra Narayan Mandal*, I.L.R. [1937] 2 Cal. 73. Trees standing on a holding do not constitute encumbrances within the meaning of sec. 26F of the B. T. Act : *Ibid*.

'Holding' in Sec. 26C, if includes structures.
Consideration money.

The "holding" in sec. 26C includes structures raised on the same, if these structures fall within the category of improvements as contemplated by the B. T. Act : *Syed Abdul Hai v. Syed Abdur Rahman*, 39 C.W.N. 64.

3. Sec. 26C (2) : Sale Price :—Under the provisions of the Bengal Tenancy Act, the landlord is entitled to have pre-emption from the transferee of an occupancy holding on payment of the consideration money as set out in the notice under sec. 26C (2) (a) of the Act, where nothing is proved to have been paid within the meaning of the provisions of sec. 26F (3) of the Act : *Kunja Kamini Ray v. Mangal Chandra Aich*, I.L.R. [1938] 1 Cal. 695 : 42 C.W.N. 209. See notes under sec. 26F.

4. Statement in the notice, if creates estoppel :—There is nothing preventing a purchaser from going back upon the statements made in the notice under sec. 26C and saying that he is a mere benamdar for a co-sharer. The principle of estoppel cannot be invoked in such a case ; *Nabendra Kishore Roy v. Abdul Majid*, 62 Cal. 939 : 39 C.W.N. 673 : 61 C.L.J. 497. Absence as a party of the co-sharer set up as the beneficial owner is no bar to the decision of the question of benami raised in pre-emption proceeding—*Ibid*.

Specific amount mentioned as consideration in instrument of transfer and notice :
Recital of mortgage debt but amount of debt not mentioned.

5. Sec. 26C, cl. (6) :—Where in an instrument of transfer the consideration was expressly stated to be Rs. 200 which was also the consideration mentioned in the notice under sec. 26C(2), but in the body of the instrument a mortgage debt due to the transferee and a mortgage decree in favour of his son were recited and stated to have been satisfied, without, however, any mention of the amounts of the said debts and it appeared that the mortgage debt was in respect of another property and the decree related to the holding in question and other properties, held (i) that the amounts of the mortgage debt and decree could not be regarded as parts of the consideration for the purposes of sec. 26F and the landlord could not be required to deposit anything more as consideration than Rs. 200 ; (ii) that neither were the said amounts payable under sec. 26F cl. (3) ; (iii) that registration of the instrument could not be held to be void because of the non-mention, separately, of the total consideration made up to the cash and the mortgage debts in the instrument of transfer and the notice accompanying it : *Kunja Kamini Ray v. Mangal Chandra Aich*, 42 C.W.N. 209.

26D. [Landlord's Transfer fee] Repealed by the Bengal Tenancy (Amendment) Act (Ben. Act VI of 1938, s. 5.)

1. Object of Repeal :—The Object of the repeal of sec. 26D was to do away with the landlord's transfer fee altogether. See notes under sec. 26F.

2. Amendment proposed :—There were three amendments proposed on the motion for the repeal of sec. 26D (landlord's transfer fee). The first amendment proposed a gradual reduction, the second one a reduction from 20 per cent. to 10 per cent. and the third reduction to Re. 1/- in the case of *bona fide* cultivators

and a reduction to eight times the rent in the case of others. The *Revenue Minister* in reply said, "speaking for myself I would have preferred the golden mean, but, so far as I can ascertain the representatives of tenants are against the retention of landlord's right to transfer fee." *The amendments were lost.* In support of the amendments for retention of the landlord's transfer fee it was said "the transfer fee and the right of pre-emption which are statutory powers under the existing Act are rights in land as they are benefits arising therefrom. If the rights and privileges are taken away, then frankly it is an act of expropriation which is being brought forward in the name of adjustment of relation of landlords and tenants * * *. The landlord has been in the enjoyment of the right to choose his tenant from time immemorial. The landlord's right to a *selami* or transfer fee for the recognition of a transfer is an incident of that essential right, and it is being exercised from long before the Permanent Settlement."

[Sec. 26D inserted by the Amending Act IV of 1928 ran as follows :—

26D. The landlord's transfer fee shall amount—

Landlord's
transfer fee.

- (a) in the case of the sale of a holding or a portion or share of a holding, in respect of which a produce rent is payable in whole or in part, to twenty *per cent.* of the consideration money as set forth in the instrument of transfer;
- (b) in the case of the sale of a holding or a portion or share of a holding, in respect of which a money rent is payable, to twenty *per cent.* of the consideration money as set forth in the instrument of transfer, or to five times the annual rent of the holding or of the portion or share transferred, whichever is greater;
- (c) in the case of a transfer by exchange of a holding or a portion or share of a holding, to five *per cent.* of the value thereof as set forth in the instrument of transfer or one and a quarter times the annual rent of the holding or of the portion or share transferred to each party to the transfer whichever is greater, payable by each party;
- (d) in the case of a transfer by gift of a holding or a portion or share of a holding, to twenty *per cent.* of the value thereof as set forth in the instrument of transfer, or to five times the annual rent of the holding

or of the portion or share transferred, whichever is greater;

- (e) in the case of a transfer by bequest of a holding or a portion or share thereof, to ten *per cent.* of the value thereof as determined by the Court for the purposes of stamp duty for the grant of probate or letters of administration, or to two and a half times the annual rent of the holding or of the portion or share transferred, whichever is greater :

Provided that where only a portion or share of a holding of an occupancy-*raiyat* is transferred, the rent of that portion or share shall, for the purpose of determining the landlord's transfer fee, under this section or section 26E, bear the same proportion to the rent of the entire holding as the area or share transferred bears to that of the entire holding :

Provided also that the landlord's transfer fee shall not be payable in the case of—

- (i) a transfer by bequest or gift (including *heba*) in favour of the husband or wife of the testator or donor or of any relation by consanguinity within three degrees of such testator or donor;
- (ii) a *wakf* in accordance with the provisions of the Muhammadan Law which provides amongst other purposes for the maintenance of the donor himself or the husband or wife of the donor or any relation by consanguinity within three degrees of the donor; or
- (iii) a dedication for religious or charitable purposes without any reservation of pecuniary benefit for any individual :

Provided nevertheless that any *wakf* which includes amongst its objects any provision for the maintenance of any person who is not one of the following, namely, the donor himself or the husband or wife of the donor or a relation by consanguinity within three degrees of the donor or any dedication for religious or charitable purposes not included in clause (iii) of the second proviso shall be liable to the

payment of landlord's transfer fee as provided in clause (d) and clause (e) of this section.

Explanation 1.—The expression "*heba*" shall not include *heba-bil-ewaj* for any pecuniary consideration.

Explanation 2.—A relation by consanguinity shall, for the purposes of this section, include a son adopted under the Hindu Law.

Notes. If transferee can question nature of tenancy :—Where the transferee of a tenancy deposited the landlord's transfer fee payable under sec. 26D of the Bengal Tenancy Act and the landlord after getting notice of the transfer started proceedings under sec. 2eF for the transfer of the holding to himself; *held*, that the transferee was precluded from raising the question of the nature of the tenancy and contending that what he had purchased was not an occupancy holding governed by sec. 26D and 26F but a *mukarari* tenancy; *Surendra Narayan Layek v. Notan Behary Mondal*, 35 C.W.N. 114 : 53 C.L.J. 414. For other case law under this section see notes under secs. 26C and 26F.]

Transferee precluded from raising question of nature of tenancy.

26E. [*Procedure on sale in execution of a decree, certificate or foreclosure of mortgage.*] *Repealed by the Bengal Tenancy (Amendment) Act (Ben. Act VI of 1938), s. 5.*

1. Object of Repeal :—See notes under secs. 26D and 26F.

2. Bengal Tenancy Ordinance, 1938 :—The Ordinance was promulgated with reference to sub-sec. (3) of this section and sub-secs. (2) and (4) of sec. 26C. As to the object and effect of the Ordinance, see notes under heading no 3 "*Bengal Tenancy Ordinance No. 1 of 1938*", ante, under the preamble at page 5.

[Sec. 26E inserted by the Amending Act IV of 1928 ran as follows :—

26E. (1) When the holding of an occupancy-*raiyat* or a portion or share thereof is sold in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913, other than a decree or certificate for arrears of rent due in respect of the holding or dues recoverable as such, and neither the purchaser nor the decree-holder is the sole landlord, the Court or the Revenue-officer as the case may be, shall, before confirming the sale, require the purchaser to file a notice giving particulars of the transfer in the prescribed form and to deposit in addition to the purchase money a process fee of the prescribed amount, the landlord's transfer fee, calculated at the rate of twenty *per cent.* of the purchase money, or five times the annual rent of the holding sold or of the portion or share thereof sold, whichever is greater, together with the prescribed cost of transmission thereof to the landlord :

Procedure on sale in execution of a decree, certificate or foreclosure of mortgage.

Provided that where a co-sharer landlord is the purchaser, he shall deposit in addition to the prescribed

process fee the amount of landlord's transfer fee proportionate to the shares of the remaining co-sharers together with the prescribed cost of transmission thereof.

(2) When a mortgage of a holding of an occupancy-*raiya*t or of a portion or share thereof is foreclosed, and the decree-holder is not himself the sole landlord, the Court shall, before making a decree or order absolute for the foreclosure, upon notice to the landlord or to his common agent, if any, determine the market value of the holding and require the mortgagee to file a notice giving particulars of the transfer in the prescribed form and to deposit a process fee of the prescribed amount and the landlord's transfer fee calculated at twenty *per cent.* of such market value, together with the prescribed cost of transmission thereof to the landlord.

(3) If the purchaser fails to comply with the order of the Court or the Revenue-officer under sub-section (1) within such time as may be specified in the said order, the Court or the Revenue-officer may make an order for the forfeiture of the purchase money and for the resale of the holding or portion or share thereof. If the mortgagee fails to comply with the order under sub-section (2) within such time as may be specified therein, the Court may make an order for dismissal of the suit for foreclosure.

(4) When the sale has been confirmed, or the decree or order absolute for the foreclosure has been made, the Court shall send to the Collector the landlord's transfer fee, the prescribed cost of transmission thereof, and the notice of the sale or final foreclosure, in the prescribed form, and the Collector shall cause the fee to be transmitted to, and the notice to be served on, the landlord named in the notice or his common agent, if any, in the prescribed manner :

Provided that where there is no common agent, a co-sharer landlord may draw his proportionate share of landlord's transfer fee by an application to the Collector, accompanied by copies of extracts from the intermediate register maintained by the Collector under section 4 of the Land Registration Act, 1876, or copies of finally published record-or-rights under Chapter X. of this Act, or any other document showing the share and title of the applicant.

Headings of Notes.

1. SEC. 26E(1) AND (3).
2. SUIT TO RECOVER BALANCE OF LANDLORD'S TRANSFER FEE.
3. REFUND OF LANDLORD'S TRANSFER FEE ON ANNULMENT OF SALE.
4. NATURE OF INTEREST OF JUDGMENT-DEBTOR NOT SPECIFIED IN SALE PROCLAMATION.
5. RECOVERY OF LANDLORD'S TRANSFER FEE ON RENT SALE FROM PRIOR TRANSFEREE FROM RAIYAT.

1. Sec. 26E(1) and (3) :—Though sec. 26E(1) does not state that the Time for
landlord's fees are to be deposited within a time to be fixed by the Court, the depositing
Court should fix a time within which the deposit required by sec. 26E(1) is landlord's
to be made. If the auction purchaser fails to make the deposit within the time transfer
so specified, the Court may then make an order for the forfeiture of the fee, if to
the purchase money and for the resale of the property. The Court may not to be fixed :
order resale without first making an order of forfeiture; and there can be Failure to
no resale under sec. 26E(3) until the time specified has expired. The sale, deposit
however, cannot be treated as a nullity merely because the landlord's fee is such fee
not deposited, or because no time is specified for making the deposit of the within
landlord's fee or because the Court overlooks the fact that such time had time fixed :
been specified, and the Court, when it has made an order of full satisfaction Forfeiture :
cannot treat the sale as a nullity and set aside the order of full satisfaction Resale.
on the ground that the decree-holder purchaser fails to deposit the fee. If
the only defect is the failure to deposit the landlord's fee, and if the decree-
holder so requires, a resale can be held under sec. 26E(3), and the provisions
of sec. 26E(3) must be complied with. Where no order of forfeiture has
been made and when no reason is given for not making such an order of
forfeiture, no order for resale can be made. The fact that the decree-holder
is the auction purchaser does not affect his liability to be penalised for
failure to deposit the landlord's fee : *Durga Charan Das v. Chairman of the*
Labanga Samabai Samity, 40 C.W.N. 143 : 62 C.L.J. 372 : A.I.R. 1936 Cal. 171 :
162 I.C. 135.

2. Suit to recover balance of landlord's transfer fee :—When the amount Suit to
deposited as transfer fee under sec. 26E of the Bengal Tenancy Act falls recover
short of the proper amount due under that section, the landlord can maintain balance of
a regular suit under sec. 9 of the Code of Civil Procedure, 1908 to recover landlord's
the balance of the amount justly due to him; and this right to maintain a transfer fee,
regular suit has not been taken away by sec. 188, proviso (i) of the Act insufficiently
inasmuch as such a case is not covered by sec. 26I of the Act : *Maharaja paid under*
Shashi Kanta Acharyya Bahadur v. Nasirabad Loan Office Co., 63 C.L.J. 105 : S. 26E, if
A.I.R. 1936 Cal. 786. maintain-
able.

3. Refund of landlord's transfer fee on annulment of sale :—Where on Refund of
the sale of an occupancy holding the landlord's transfer fee was put in but landlord's
the tenant judgment-debtor subsequently applied under Order 21, Rule 90 for transfer fee.
having the sale set aside and during the pendency of the application the land-
lord drew out the transfer fee and later on the applicant and the purchaser
agreed to have the sale set aside and the purchaser then sued the landlord for
recovery of the transfer fee; *held*, that the sale having been set aside after
great lapse of time by private agreement the landlord was not bound to
restore the transfer fee : *Sarat Chandra Bhattacharjee v. Sambhu Nath Bhatta-*
charjee, 37 C.W.N. 918.

4. Nature of interest of judgment-debtor not specified in sale pro- Nature of
clamation :—Where a tenant's holding is sold in execution of a money decree, interest of
without any specification in the sale proclamation as to the interest of the judg-
ment-debtor, i.e., where there is no mention that the property to be sold the judg-
is an occupancy holding, the Court cannot order the auction purchaser to ment debtor
deposit the landlord's transfer fee on the basis that the property is an left blank
occupancy holding under sec. 26E. The Court cannot in such a case rely on in the sale
a supposed practice of the Court, which has no justification in law and treat proclamation, effect
the holding as an occupancy holding when the proclamation itself is blank of.
in that respect. The auction purchaser, who happens to be a third party,
can be ordered to deposit fee only on the basis that the tenancy is a *mokarari*
tenure; and when the landlord is not a party to the proceedings, there is no
necessity for an investigation into the status of the judgment-debtor, as
such an investigation would be fruitless : *Mahomed Imran v. Durgapada*
Chattopadhyaya, 39 C.W.N. 985.

5. Recovery of landlord's transfer fee on rent sale from prior transferee from raiyat :—A landlord who has caused an occupancy holding to be sold in execution of a rent-decree is not, for that reason, debarred from recovering landlord's transfer fee from a prior transferee from the raiyat, such fee not being a price of recognition under the Bengal Tenancy Act : *Maulvi Sharaf-uddin Ahmed v. Maharaja Jagadish Nath Roy Bahadur*, 63 Cal. 900 : 40 C.W.N 502 : 63 C.L.J. 255.]

Old.**New.**

Power of immediate landlord to purchase.

26F. (1) Except in the case of a transfer—

- (a) to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase,
- (b) in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913, for arrears of rent due in respect of the holding or dues recoverable as such,
- (c) by exchange, or
- (d) referred to in the second proviso to section 26D,

the immediate landlord of the holding or the transferred portion or share may, within two months of the service of notice issued under section 26C or 26E, apply to the Court that the holding or portion or share thereof shall be transferred to himself.

(2) The application shall be dismissed, unless such landlord at the time of

Power of co-sharer of transferor to purchase.

26F. (1) Except in the case of—

- (a) a transfer to a co-sharer in the tenancy whose existing interest has accrued otherwise than by purchase, or
- (b) a transfer by exchange, lease, or partition, or
- (c) a transfer by bequest, or gift (including *heba* but excluding *heba-bil-ewaz* for any pecuniary consideration) in favour of the husband or wife of the testator or the donor or of any relation by consanguinity within three degrees of the testator or donor, or
- (d) a *wakf* in accordance with the provisions of the Muhammadan Law, or
- (e) a dedication for religious or charitable purposes

Old.

making it, deposits in Court the amount of the consideration money or the value of the property, as the case may be, as stated in the notice served on him, together with compensation at the rate of ten *per cent.* of such amount.

(3) If such deposit is made, the Court shall give notice to the transferee to appear within such period as the Court may fix and state what other sums he has paid in respect of rent for the period after the date of transfer or as the landlord's transfer fee or in annulling encumbrances on the property. The Court shall then direct the applicant and any person who has joined as a co-applicant under clause (b) of sub-section (4) to deposit within such period as the Court thinks reasonable such amount as the transferee has paid on this account, together with interest at a rate not exceeding twelve and a half *per cent.* per annum with effect from the date on which such rent or the landlord's transfer fee has been paid or the encumbrances have been annulled.

(4) (a) When an application has been made by a co-sharer immediate landlord under s u b-

New.

without any reservation of pecuniary benefit for any individual—

one or more co-sharer tenants of the holding, a portion or share of which is transferred, may within four months of the service of the notice under section 26C, apply to the Court for the said portion or share to be transferred to himself or themselves.

Explanation.—A relation by consanguinity shall, for the purposes of this section, include a son adopted under the Hindu Law.

(2) T h e application shall be dismissed unless the applicant or applicants at the time of making it, deposit in Court the amount of the consideration money or the value of the transferred portion or share of the holding, as stated in the said notice, together with compensation at the rate of ten *per centum* of such amount.

(3) If such deposit is made, the Court shall give notice to the transferee to appear within such period as it may fix and to state what other sums he has paid in respect of rent or in annulling incumbrances on the property since the date of the transfer. The Court shall then direct the applicants

*Old.**New.*

section (1), any of the remaining co-sharer landlords, including the transferee, if one of them, may within the period of two months referred to in that sub-section, or within one month of the application, whichever is later, apply to join in the application of the co-sharer immediate landlord aforesaid, and any co-sharer landlord who has not applied under sub-section (1) or has not applied to join under this sub-section shall not have any further power of purchase under this section.

(b) The application to join as a co-applicant shall be granted if within such period as the Court may fix not extending beyond the period referred to in sub-section (4) (a) the applicant deposits in Court, for payment to the co-sharer landlord who has made the application under sub-section (1), such sum as the Court shall determine as the share to be paid by him for the purposes of sub-section (2).

(5) If the deposits required under sub-section (2) or clause (b) of sub-section (4), as the case may be, and under sub-section (3) are made, the Court shall make an order allowing the application and directing that the deposits made under sub-

[including any person whose application under sub-section (4) has been granted] to deposit within such period as the Court thinks reasonable, such amount as the transferee has paid on such account, together with interest at the rate of six and a quarter *per centum per annum* with effect from the date on which the transferee made such payments.

(4) (a) When an application has been made under sub-section (1), any of the remaining co-sharer tenants, including the transferee, if one of them, may within the period referred to in that sub-section or within one month of the date of the application, whichever is later, apply to join in the said application; any co-sharer tenant who has not applied under either sub-section (1) or this sub-section shall not have any further power of purchase under this section.

(b) Such application to join as a co-applicant shall be dismissed unless within such period as the Court may fix, not extending beyond the period referred to in clause (a), the applicant deposits in Court for payment to the applicant or applicants under sub-section (1), such sum as

Old.

sections (2) and (3) shall be paid to the transferee or to such other persons as the Court thinks fit.

(6) From the date of the making of the order under sub-section (5)—

- (i) the right, title and interest in the holding or portion or share thereof accruing to the transferee from the transfer shall, subject to the provisions of section 22, be deemed to have vested in the immediate landlord and co-sharer immediate landlord, if any, whose application has been allowed free from all incumbrances which have been discharged or created after the date of the transfer,
- (ii) the liability of the transferee for the rent due on account of the holding shall cease, and
- (iii) the Court on the further application of such landlord or co-sharer immediate landlord may place him in possession of the property so vested in him.

New.

the Court shall determine as the share to be paid by him for the purposes of sub-section (2). If such deposit is made, the Court shall grant the application to join, and thereafter such applicant shall be deemed to be an applicant under sub-section (1).

(5) The Court shall thereafter make an order allowing the applications under sub-section (1) of such applicants [whether they applied under sub-section (1) or sub-section (4)] who have made the deposits required by this section and directing that the deposits made under sub-sections (2) and (3) shall be paid to the transferee or to such other persons as the Court thinks equitable.

(6) In making an order under sub-section (5) in favour of more than one co-sharer tenant, the Court may apportion the property comprised in the portion or share transferred among the applicants in such manner as it deems equitable after taking existing possession into consideration; the Court shall so apportion the said property or portion thereof on the request of any applicant, and in this case may require the applicant who makes such request to make, within

Old.

(7) When a transferee is divested of his right, title and interest under the provisions of sub-section (6), he shall for the purposes of clauses (a), (c) and (d) of section 156 be deemed to be a *raiyat* ejected from his holding by proceedings for his ejectment commencing on the date on which the landlord applied to the Court under sub-section (1).

(8) Nothing in this section shall take away the right of pre-emption conferred on any person by Muhammadan Law.

New.

such period as the Court may fix, such further deposit as the Court considers necessary for equitable distribution among the remaining applicants :

Provided that no apportionment ordered under this sub-section shall operate as a division of the holding.

(7) From the date of the making of the order under sub-section (5)—

(a) the right, title, and interest in the portion or share of the holding, accruing to the transferee from the transfer shall, subject to the provisions of section 22 and to any orders passed under sub-section (6), be deemed to have vested, jointly and free from all incumbrances which have been annulled or created after the date of the transfer, in the co-sharer tenants, whose applications to purchase have been allowed under this section,

(b) the liability of the transferee for the rent due from him on account of the transfer shall cease, and

New.

(c) the Court on further application of such applicant or applicants may place him or them, as the case may be, in possession of the property vested in them.

(8) When a transferee is divested of his right, title and interest under the provisions of sub-section (7), he shall for the purposes of clauses (a), (c) and (d) of section 156 be deemed to be a *raiyat* ejected from his holding by proceedings for his ejectment commencing on the date on which the application under sub-section (1) was made.

(9) Nothing in this section shall take away the right of pre-emption conferred on any person by Muhammadan Law.

(10) An appeal shall lie to the ordinary Civil Appellate Court from any order of a Court under this section.

(11) In this section 'transfer' does not include simple or usufructuary mortgage or mortgage by conditional sale until a decree or order absolute for foreclosure is made.

Headings of Notes.

1. AMENDMENT : ACT VI OF 1938.
2. OBJECT OF AMENDMENT : ABOLITION OF LANDLORD'S RIGHT OF PRE-EMPTION AND TRANSFER FEE.
3. OBJECT OF NEW SEC. 26F : CO-SHARER TENANT'S RIGHT OF PRE-EMPTION.
4. EFFECT OF AMENDMENT OF SEC. 26F.
5. APPEAL : SUB-SEC. (10).

*B. T.
(Amend-
ment) Act
VI of 1938.*

1. Amendment : Act VI of 1938 :—*New sec. 26F was substituted for old sec. 26F by the B. T. (Amendment) Act VI of 1938. This new sec. 26F was not in the B. T. (Amendment) Bill, 1937, introduced in the Assembly and it was moved by way of an amendment by a private member. The Government accepted the amendment and moved a different draft, which was agreed to by the Assembly. The Select Committee in the Legislative Council, to which the Bill was referred, recommended for allowing the landlord the right to pre-empt in the event of no application being made for the purpose by any co-sharer tenant. The Revenue Minister, however, moved for the omission of that provision and the motion was agreed to by the Council.*

*Abolition of
landlord's
right of
pre-emption
and
transfer fee.*

2. Object of Amendment : Abolition of landlord's right of pre-emption and transfer fee :—*The Revenue Minister, in moving for the abolition of the landlord's transfer fee and the right of pre-emption said that the object is "not to deprive the landlord of his valuable rights in land or to challenge his rights of ownership. It is only to give relief to the agriculturists. * * * It is not to attack the landlord's vested interest or his right of proprietorship, but simply to give financial relief to the agriculturists to some extent." This amendment was opposed on amongst other the following grounds (1) that the "right of pre-emption is inseparable from ownership of land. It is an important right or privilege which is correlated with proprietary rights in the soil which belong to the landholder in the terms of the Permanent Settlement." (2) "The right of pre-emption is the only protection against an undesirable tenant coming in by right of purchase." (3) "If the transfer fee and the right of pre-emption are abolished the right of the raiyats to transfer should be restricted." (4) "The proposals do not contain any suggestion for compensation." (5) The right of pre-emption maintains the value of the land which is not only of benefit to the landlords but also to raiyats" and (6) "No valid reason has been made out for doing away with the landlord's right to selami (transfer fee) and pre-emption. There is absolutely no logic behind such a demand. The only logic is the logic of 'might is right'". See notes under sec. 26D under the heading no. 2 "Amendment proposed" at pages 76 and 77.*

*Co-sharer
tenants'
right of
pre-emption*

3. Object of New Sec. 26F : Co-sharer tenant's right of pre-emption :—*The Revenue Minister in moving for the insertion of the new sec. 26F by way of an amendment said that "the main principle on which the right of pre-emption was conceded to the landlords was this: When the landlord considers that somebody who has purchased a holding is not a desirable tenant in his opinion, he might step in to prevent that man from getting possession of the land ; if he did not want to accept the tenant he might exercise*

his right of pre-emption. *But the right of pre-emption that is now suggested is based entirely on different principle.* This right of pre-emption of co-sharer tenants will help the consolidation of holding and will prevent family property from passing out of the family into the hands of the stranger." This amendment was opposed and one of the objections was that "the provision in the Bill giving the right of pre-emption to co-sharer tenant is *ultra vires* of sec. 299, cl. (3) of the Government of India Act, 1935 and the transference of the right of pre-emption from the landlords to the co-sharer tenants alters the character of the Permanent Settlement." *Co-sharer tenants' right of pre-emption.*

4. Effect of Amendment of Sec. 26F :—*See notes under sec. 26J under the heading no. 2 "Effect of Repeal" at p. 103.* It appears that in respect of transfers of the holding of an occupancy-raiyat or a share or a portion thereof the documents of which were executed and registered before the B. T. (Amendment) Act VI of 1938 came into force the landlord acquired a vested right entitling him to pre-empt and as such he would be competent to continue the applications under sec. 26F started before the said Act came into force, and also enforce his said right now if not otherwise barred by means of a suit. *See notes under heading no. 2 at p. 103.*

5. Appeal: Sub-sec. 10 :—This sub-sec. (10) allowing an appeal against any order under this section was not in the original Bill. It was added by the Select Committee appointed by the Council, and was agreed to by the Legislature. There was no right of appeal under old sec. 26F. It appears that the word "*an appeal*" in this sub-section means only *one* appeal and cannot be interpreted as including by implication a *second appeal* also. *See in this connection Charles De Sa Fragoso v. Meher Ali, I.L.R. [1937] 2 Cal. 496; 41 C.W.N. 993; and Kulada Prasad Mazumdar v. Kumar Pratiba Nath Ray, 62 Cal. 149; 60 C.L.J. 112; A.I.R. 1935 Cal. 91 in which the word "an appeal" in sec. 174, sub-sec. (5) was interpreted as not including a second appeal.* *Sub-sec. (10) inserted by B. T. (Amendment) Act VI of 1938: "An appeal" in this sub-sec. if includes second appeal.*

(Case law under old sec. 26F)

Headings of Notes.

1. APPLICABILITY OF SEC. 188 TO PRE-EMPTION APPLICATION.
2. NECESSARY PARTIES TO PRE-EMPTION APPLICATION.
3. RIGHT OF CO-SHARER LANDLORD TO PRE-EMPT WHEN NOT RECEIVING NOTICE.
4. PARTIAL PRE-EMPTION IF MAINTAINABLE.
5. SECOND APPLICATION FOR PRE-EMPTION WHEN FIRST APPLICATION DISMISSED FOR TECHNICAL DEFECT.
6. SIMULTANEOUS PRE-EMPTION APPLICATION BY CO-SHARER LANDLORDS.
7. TRANSFEROR IF HAS LOCUS STANDI TO TAKE ANY PART IN PRE-EMPTION PROCEEDING.
8. LANDLORD APPLYING FOR PRE-EMPTION IF CAN OPPOSE APPLICATION FOR SETTING ASIDE SALE.
9. LANDLORD ACCEPTING TRANSFER FEE IF CAN PRE-EMPT.
10. PURCHASER IF ENTITLED TO GET COMPENSATION FROM THE LANDLORD FOR IMPROVEMENTS EFFECTED AFTER PURCHASE.
11. COURT IF MAY CONSIDER VALIDITY OF SALE IN DEALING WITH PRE-EMPTION APPLICATION.
12. MANNER OF SERVICE OF NOTICE UNDER SEC. 26F.
13. RIGHT OF PRE-EMPTION TO TREES PENDING PRE-EMPTION APPLICATION.
14. QUESTION OF BENAMI IF CAN BE DECIDED IN PRE-EMPTION PROCEEDING.
15. TITLE OF THIRD PARTY.

16. SUB-SEC. (1) : "COURT" : WHERE PRE-EMPTION APPLICATION TO BE MADE.
17. SUB-SEC. (1) : "HOLDING".
18. SUB-SEC. (1), CL. (a).
19. SUB-SEC. (2).
20. SUB-SEC. (2) : "VALUE OF PROPERTY".
21. SUB-SEC. (2) : TIME OF DEPOSIT.
22. SUB-SECS. (2) AND (3).
23. SUB-SEC. (3).
24. SUB-SEC. (4).
25. SUB-SEC. (4) (a).
26. SUB-SECS. (1), (5) AND (6).
27. SUB-SEC. (5).
28. SUB-SEC. (6) : EFFECT OF ORDER GRANTING PRE-EMPTION APPLICATION.
29. SUB-SEC. (6), CL. (iii).
30. SUB-SEC. (8) : PRE-EMPTION UNDER THE MAHOMEDAN LAW NOT AFFECTED.
31. SECTIONS 26F AND 48II.
32. COMBINED APPLICATION UNDER SECS. 26F AND 26J.
33. MISCELLANEOUS.

Proceedings under Sec. 26F governed by S. 188 : All co-sharer landlords must be made parties.

1. Applicability of Sec. 188 to pre-emption application:--Proceedings under sec. 26F of the Bengal Tenancy Act are governed by sec. 188 of the Act, which requires two conditions to be fulfilled : (1) all co-sharer landlords should be made parties defendants, and (2) all co-sharer landlords should be given an opportunity of joining as co-applicants without regard to the first condition, though it is true that there is no time-limit prescribed, it being sufficient if the co-sharers are made parties at any time before final orders are passed, the second condition mentioned in the proviso of sec. 188 requires that a co-sharer landlord upon whom notice of transfer under sec. 26C or 26F has been served, and who wishes to apply under sec. 26F (1) must give information of his application to all the co-sharer landlords known to him within such time that those co-sharer landlords can, if they wish, make an application under sec. 26F (1) (a) and a deposit under sec. 26F (4) (b) within two months of the service of notice on the co-sharer landlord applying under sec. 26F (1) or within one month of his application under whichever is the later. If he fails to do so within the time so described his application should be rejected not because it is barred by limitation, but because he has failed to comply with the conditions laid down : *Mahomed Garib Hossain Mia v. Sm. Halimannessa Bibi*, 62 Cal. 102 : 39 C.W.N. 1178.

An application for pre-emption is maintainable only if the provisions of sec. 148A of the Bengal Tenancy Act are complied with, that is to say, if all the other co-sharer landlords are made parties to the proceeding. Sec. 22 of the Limitation Act applies to an application for pre-emption : *Dinesh Chandra Chowdhury v. Rajendra Chandra Kar*, 42 C.W.N. 516 : A.I.R. 1938 Cal. 324.

Minor impleaded as a party but no guardian appointed, effect of.

An application for pre-emption under sec. 26F is not defective merely because one of the opposite parties impleaded in it is a minor and no guardian is appointed to act for him. The minor must be taken to have been made a party for purposes of sec. 188. The subsequent proceedings are however irregular if the Court fails to appoint a guardian to act for the minor and the order for pre-emption passed therein is liable to be discharged and the case remitted to the lower Court in order that the proceedings may be continued after appointment of a guardian of the minor. If after the appointment of the guardian, the minor wants to be made a co-applicant, his application is competent, although made after the period of limitation for making it is over, provided it is made promptly. The minor should not be allowed to suffer by reason of the failure of the Court to discharge its duty : *Mukhi Devi v. Monorama Mitra*, 40 C.W.N. 1211 : 63 C.L.J. 566 : A.I.R. 1936 Cal. 490.

S. 26(4) (a) and S. 188.

There is a slight discrepancy between the wording of sec. 26F (4) (a) and sec. 188 and though the former suggests the possibility of an application without all the co-sharers on the record in the first instance, the governing section is sec. 188 and it is necessary that all the co-sharer landlords should be in the proceeding either as applicants or as parties defendants and the Court is not competent to entertain the application unless and until it is put in proper form. Where, however, the whole of the landlord's interest in the holding transferred is represented by the persons who are parties to the proceeding, the application is in order : *Baikuntal Chandra Saha v. Samsul Huq*, 61 Cal. 870 : 38 C.W.N. 634.

Where an application under sec. 26F was filed by one co-sharer only and in the body of the petition it was stated that two others were co-sharers and their interest was specified but they were not impleaded, held that the application could not be entertained in view of sec. 188 : *Barkatulla Pramanik v. Ashutosh Ghose*, 37 C.W.N. 89.

An application for pre-emption by some co-sharers is not maintainable where the other co-sharers are not impleaded within the period of limitation for the institution of such a suit even though co-sharers who are impleaded subsequent to such period state that they had no wish to purchase the land : *Rajanees Kanta Laha v. Atul Chandra Seal*, 60 Cal. 787 : A.I.R. 1933 Cal. 636 : 145 I.C. 836.

All persons who are in fact co-sharer landlords must be made parties to an application under sec. 26F, Bengal Tenancy Act, whether all such persons are named in the notice of transfer or not. Where the petitioner was described in the deed of transfer as the sole landlord and notice of the transfer is given to him, he is nevertheless bound, if in fact there is another co-sharer to implead the latter as a party to his application within the period of limitation : *Adhar Chandra Saha v. Gour Chandra Saha*, 38 C.W.N. 1098.

Co-sharer landlords though not named in the notice of transfer, must be made parties.

In an application of pre-emption under sec. 26F the applicant landlord must make his co-sharers parties. The fact that the deed of transfer mentions the applicant as the sole landlord and that notice of transfer is given to him as the sole landlord will not estop the transferee from pleading that the applicant is not the sole landlord and that the application is therefore incompetent by reason of the nonjoinder of the other co-sharers : *Prohalal Chandra Manna v. Khirad Chandra Jana*, 39 C.W.N. 862.

To an application under sec. 26F all co-sharers must be made parties. Where a co-sharer who is known to exist is not so impleaded within the period of limitation but impleaded only afterwards, the application must fail : *Adhar Chandra Saha v. Gour Chandra Saha*, 38 C.W.N. 1098 : A.I.R. 1935 Cal. 153 : 154 I.C. 823.

Where some of the co-sharer landlords file the application for pre-emption, an application by the applicants for addition of their co-sharer landlords as opposite parties must be made within the two periods mentioned in sub-sec. 4 (a) of sec. 26F of the Bengal Tenancy Act, namely either within two months of the service of notice issued under sec. 26C or 26I, or within one month of the application for pre-emption. But though all co-sharer landlords are necessary parties to an application for pre-emption, it is not necessary that such of them as are left out in the original application for pre-emption should be added within two months of the date of service of notice under sec. 26C or sec. 26I, on the co-sharer who has filed the application for pre-emption : *Gajendra Nath Mandal v. Kunja Behari Mistri*, 40 C.W.N. 506 : A.I.R. 1936 Cal. 388.

Where some of the co-sharer landlords apply for pre-emption under sec. 26F (1) of Bengal Tenancy Act, the remaining co-sharers must be made opposite parties either in the application originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-sec. (4) of sec. 26F. That is the effect of the words "giving opportunity of joining in the proceedings" occurring in sec. 188. It is not necessary that the co-sharer landlords applicants must invite the remaining co-sharer landlords to join in their application or should expressly consent to their so joining. All that is necessary is that the applicants must place their co-sharer landlords in a position to join in the pre-emption if they like. The absence of an express statement in the application to the effect that the applicants have no objection to their co-sharer landlords joining in the application or that they would be willing to treat them as co-applicants, would not make their application for pre-emption a bad one on that account : *Sachindra Nath Chakravorty v. Tralakra Nath Chakravorty*, 40 C.W.N. 1023 : A.I.R. 1936 Cal. 576.

2. Necessary parties to pre-emption application:—Proceedings under sec. 26F are governed by sec. 188 of the Bengal Tenancy Act and all co-sharer landlords must be made parties, see notes under the heading No. 1 above "Applicability of sec. 188 to pre-emption application."

In an application for pre-emption a transferee of an occupancy holding is not estopped by the recitals in the transfer deed that certain persons were the landlords of the holding, but the application for pre-emption made by persons mentioned as landlords in the deed of transfer cannot be held to be incompetent on the ground of their not being the landlords, when the

facts are such that if other persons are the real landlords, the transferee must have known of it at the time of the deed, particularly when the objection merely is that an idol, of which the applicants are *sebayets*, is the landlord and it is doubtful if that is correct: *Choudhury Mahendra Nath Das v. Radhashyam Mandal*, 41 C.W.N. 1185; A.I.R. 1937 Cal. 577. Where the adult co-sharers of a *mitakshara* family are the actual managers of the properties and they apply for pre-emption under sec. 26F of the Bengal Tenancy Act, without impleading the minor sons and nephews, who are under their care and who are also co-sharers under the *Mitakshara Law*, the application cannot be dismissed merely because such sons and nephews are not impleaded—*Ibid.*

Vendor not a necessary party : Purchasers whose name are not mentioned in the notice not necessary parties. Where benamdar is made a party, pre-emption application not defective by failure to implead the beneficiary. Allotment under the Estates Partition Act. Co-sharer landlord not receiving notice, entitled to pre-empt.

In an application by the landlord for pre-emption the vendor is not a necessary party. Nor is the landlord bound to implead those purchasers whose names are not found in the notice given to him: *Govinda Chandra Chowdhury v. Nagendra Kumar Chowdhury*, 37 C.W.N. 914; 57 C.L.J. 438; A.I.R. 1934 Cal. 39; 148 I.C. 108.

A *benamidar* fully represents in a suit or proceeding the beneficial owner. Where therefore in an application for pre-emption under sec. 26F of the Act, the *benamidar* of certain co-sharer landlords is made a party, the application is not defective by reason of failure to implead the co-sharer landlords. The *benamidar* represents the co-sharer landlords and the co-sharer landlords can at any time be added as parties in place of the *benamidar*, in case they want to come in and represent themselves instead of their *benamidar* representing them: *Mukli Devi v. Monorama Mitra*, 40 C.W.N. 1211; 63 C.L.J. 566; A.I.R. 1936 Cal. 490.

A, B and C were co-sharer landlords in respect of three occupancy holdings. Later on, under a proceeding under the Bengal Estates Partition Act, two holdings were exclusively allotted to A and the third holding was allotted partly to A and partly to B and C. B and C instituted a suit for rent for the three holdings for a period anterior to the partition without impleading A and obtained decrees and in execution thereof purchased the three holdings. A applied for pre-emption, held that his application was competent: *Ramshashi Ghose v. Mohendra Nath Sinha*, A.I.R. 1936 Cal. 223; 162 I.C. 664.

3. Right of Co-sharer landlord to pre-empt when not receiving notice:—There is a lacuna in the provisions of sec. 26F the terms of which do not indicate what is to be the position of co-sharer landlords who receive no notice under sec. 26C but happen to hear of the transfer from some other source. In a such case on the only equitable construction of the section, the landlord can exercise his right of pre-emption within a reasonable time of the fact of the transfer coming to his knowledge: *Balkunta Chandra Saha v. Samsul Huq*, 61 Cal. 870=38 C.W.N. 634=A.I.R. 1934 Cal. 662=152 I.C. 279; See also *Brajendra Kumar Banerji v. Lymannessa Bibi*, 38 C.W.N. 1002; A.I.R. 1934 Cal. 830; 154 I.C. 576.

The right of pre-emption under sec. 26F should be exercised within the two months of the service of notice under secs. 26C and 26E. The Act does not make any provision with regard to cases where no notice has been issued or persons who claim to be landlords of the occupancy holding which has been sold. In such state of things it would be right to construe the section as giving the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under sec. 26C or 26E, but who claim to be the landlords of the the occupancy holding—the right to be exercised within a reasonable time of the knowledge of the sale. It cannot be contended that although the legislature intended clearly by the provisions of sec. 26F to give a right of pre-emption to the landlord, it could only be exercised by persons who would be described in the notices served through the collector as the landlords of the holding although in reality there may be persons who would be served in the notices who are co-sharers in the superior interest: *Surya Kumar Mitra v. Munshi Noabali*, 59 Cal. 15; 35 C.W.N. 688; 53 C.L.J. 578; A.I.R. 1932 Cal. 289; 136 I.C. 871. This rule cannot be extended to applications under sec. 26F (4) (a): *Mahomed Garib Hossain Mia v. Halimannessa Bibi*, 62 Cal. 102; 39 C.W.N. 1178.

Such right to be exercised within a reasonable time.

Partial pre-emption, if allowed.

4. Partial pre-emption if maintainable:—Where certain properties were sold in two lots in execution of a money decree and the landlord wanted to exercise his right of pre-emption under sec. 26F of the Bengal Tenancy Act with regard to one lot only, held that this could not be allowed: *Surabala Basu v. Rukmini Kanta Barman Roy*, 42 C.W.N. 288. See also

Behari Lal Roy v. Pullin Behari Paul, AB C.W.N. 654 : A.I.R. 1934 Cal. 691 : 152 I.C. 480.

5. Second application for pre-emption when dismissed for technical defect:—A second application for pre-emption under sec. 26F of the Bengal Tenancy Act is maintainable if it is not otherwise barred, when the first application has been dismissed for a technical defect : *Ananta Lal Saha v. Kamakhya Charan Das*, 41 C.W.N. 1371.

6. Simultaneous pre-emption applications by co-sharer landlords:—Where a co-sharer landlord making an application for pre-emption under sec. 26F is added as a co-applicant, on his request, in another application by his co-sharer landlords and the latter application is dismissed by reason of certain defects, he is not debarred from continuing his own application. Each of the co-sharer landlords has an independent right to make an independent application under sec. 26F (1) and he is not entitled to exercise his right of pre-emption only by becoming a co-applicant in other co-sharer's pending application for pre-emption. Two applications for pre-emption can go on simultaneously : *Mukli Devi v. Monorama Mitra*, 40 C.W.N. 1211 : 63 C.L.J. 566 : A.I.R. 1936 Cal. 490.

7. Transferor if has locus standi to take any part in pre-emption proceeding:—In proceedings under sec. 26F the transferor has no *locus standi* to take any part whatever. He cannot contest the application ; and if the Court gives effect to his objections and dismisses the application on the ground that there has been no transfer, its action is unjustified : *Nibaran Chandra Bhattacharjee v. Hem Nalini Debi*, 61 C.L.J. 310 : A.I.R. 1936 Cal. 167.

8. Landlord applying for pre-emption if can oppose application for setting aside sale:—A landlord who receives notice of transfer and files an application under sec. 26F, in respect of property sold in execution of a money decree, is entitled to oppose an application to set aside the execution sale, as he has an interest in the matter : *Annada Charan De v. Mahalakshmi De*, 59 C.L.J. 417 : A.I.R. 1934 Cal. 795 : 151 I.C. 1088.

9. Landlord accepting transfer fee if can pre-empt:—Under sec. 26F the landlord may accept the transfer fee and afterwards apply for pre-emption provided he does so within the period of two months of the date of the notice and if he does accept the transfer fee, he will, when his application is granted, return the transfer fee together with interest at the rate of 12½ per cent. per annum : *Gobinda Chandra Chowdhury v. Nagendra Kumar Chowdhury*, 37 C.W.N. 914 : 57 C.L.J. 438 : A.I.R. 1934 Cal. 39 : 148 I.C. 108.

A landlord is not precluded from claiming pre-emption by reason of his agreeing to have a rent sale set aside under sec. 174 of the Act by accepting the deposit of the decretal amount : *Sheikh Dabiruddin v. Kristo Chandra Mukopadhyaya*, 35 C.W.N. 656 : 54 C.L.J. 231. Slight discrepancies in the description of the property in the application for pre-emption compared with the notice does not invalidate the application. *Ibid.*

10. Purchaser if entitled to get compensation from the landlord for improvements effected after purchase:—In an application for pre-emption under sec. 26F, the applicant landlord is not liable to pay any amount as compensation for improvements effected by the purchaser on the land. The section leaves no discretion to the Court to make the order of pre-emption conditional on the payment of value of improvements. Such value, if any, must be sought for by the purchaser in a separate proceeding : *Secretary of State v. Sukh Chand Saw*, 38 C.W.N. 849 : 59 C.L.J. 471 : A.I.R. 1934 Cal. 749 : 152 I.C. 557.

11. Court if may consider validity of sale in dealing with pre-emption application:—After notice has been issued under sec. 26C of the Bengal Tenancy Act it is not open to the Court while dealing with the landlord's application under sec. 26F to consider the reality or otherwise of the transaction as to whether it is valid and was acted upon : *Satyendra Nath Rai Chowdhury v. Fulsom Bibi*, 36 C.W.N. 486.

A *heba-bil-ewaz* being a sale and not, like *heba*, a gift, the fact of the properties remaining in the possession of the vendor does not affect the validity of the transaction : *Ibid.*

12. Manner of service of notice under Sec. 26F:—The manner of service of notice for the purpose of sec. 26F is laid down in Chapter V of the Bengal Government Rules, which were made in the exercise of powers conferred by sub-sec. (7) of sec. 39 and sec. 189 of the Act and published

Second application for pre-emption, if maintainable.

Each co-sharer landlord has independent right to apply for pre-emption : Two pre-emption applications can go on simultaneously.

Transferor, if has *locus standi* in pre-emption proceeding.

Landlord not estopped from claiming pre-emption for accepting the deposit of the decretal amount on his agreeing to the rent sale being set aside.

Question as to validity of sale if can be gone into in pre-emption proceeding.

Manner of service of notice.

on 28th March, 1929. The prescribed manner is, as laid down in rule 27 (1), normally by registered post. Rule 27 (2) seems to be intended to cover all cases where the sending of notices by registered post has not the effect of bringing to the knowledge of the landlord the fact that a transfer has taken place. There is no real distinction between the failure to obtain an acknowledgment because the post office has been unable to deliver the registered letter by reason of it having been wrongly addressed and a case where there has been failure to obtain an acknowledgment by reason of the addressee landlord refusing to give any such acknowledgment. In either case, if the special acknowledgment referred to in Rule 27 (1) cannot be obtained, service can take place by the notice being displayed in the office of the Collector for a period of one month. As it stands at present, these are the only two ways of effecting service. Where, therefore, the registered post having been wrongly addressed never reached the landlord, a notice of the transfer was affixed at the Collectorate for one month, an application by the landlord under sec. 26F (1) more than two months from the end of the month of notice in the Collectorate is barred: *Mukundalal Roy v. Sudarshan Mukerji*, 61 Cal. 351: A.I.R. 1934 Cal. 550: 150 I.C. 658.

Transferee
liable to
damages
for cutting
trees
pending
pre-emption
application.

13. Right of pre-emptor to trees pending pre-emption application :— Although the right, title and interest in a holding vests in the applicant for pre-emption only from the date of the order on such application and not earlier, it does not necessarily follow that he has no remedy if after the purchase and before the date of order for pre-emption the transferee cuts down trees or otherwise impairs the value of the holding. Where, therefore, pending the application for pre-emption under sec. 26F, the transferee cuts and removes trees he is liable in damages to the landlord: *Tarini Prasad Mitra v. Rakhal Chandra Manna*, 39 C.W.N. 459.

14. Question of benami if can be decided in pre-emption proceeding :— In an application for pre-emption under sec. 26F of the Bengal Tenancy Act, made by the landlord against a stranger purchaser named as such in the notice under sec. 26C, it is open to such stranger purchaser to plead that he is only a *benamidar* for a co-sharer in the tenancy. It is also legitimate and proper for the Court to go into and decide the question of *benami*. The non-joinder of the co-sharer who is alleged to the real purchaser is no bar to the decision of the question of *benami*, inasmuch as the *benamidar* represents the real or beneficial owner: *Nabendra Kishore Roy v. Abdul Majid*, 62 Cal. 939: 39 C.W.N. 673: 61 C.L.J. 497.

15. Title of third party :—In an application under sec. 26F of the Bengal Tenancy Act, the title of a third party cannot be adjudicated upon: *Jogendra Nath Chowdhury v. Sk. Golam Samdani*, 41 C.W.N. 1155: 65 C.L.J. 472. Unless the case can be brought within the four exceptions enumerated in the section, the landlord is entitled to pre-emption on proof of the facts required to be proved by the section. The transferee cannot raise an independent issue of title: *Ibid*.

Court where
pre-emption
application
to be made.

16. Sub-Sec. (1) —“Court” where pre-emption application to be made :— Applications by the landlords under sec. 26F to exercise their right of pre-emption under sec. 26F in respect of certain holdings which had been sold by a Court in execution of a decree for money should be made only to the Court which would have jurisdiction to entertain suits for possession of the tenure or holding in connection with which the applications are made and not the Court which sold the holdings in execution, if the latter should be different: *Jalindra Kumar Chakraborty v. Chandra Kumar*, 38 C.W.N. 616: A.I.R. 1934 Cal. 661: 153 I.C. 509.

“Holding”,
if includes
structures.

17. Sub-Sec. (1) —“Holding” :—“Holding” under the Bengal Tenancy Act in regard to which an application for pre-emption under sec. 26F is entertainable includes also structures raised on the same, when these fall under the category of improvements; an improvement has always to be considered as appurtenant to a holding and not as something separable from it: *Syed Abdul Hai v. Syed Abdur Rahman*, 39 C.W.N. 64: 60 C.L.J. 399: A.I.R. 1935 Cal. 258.

Right of
pre-emption
by landlord
in case of
transfer to
co-sharer
tenant.

18. Sub-Sec. (1) cl. (a) :—Where a co-sharer tenant, who had got his title by purchase before the amending Act of 1928, obtained transfer of a portion of the occupancy holding thereafter, held that the superior landlord could claim pre-emption in respect of the transfer of that portion: *Abdul Jalil v. Mahamuda Khalun*, 37 C.W.N. 848: 58 C.L.J. 143: A.I.R. 1934 Cal. 3: 147 I.C. 1040.

19. Sub-Sec. (2) :—In execution of a decree an occupancy holding was sold and was purchased by the decree holder for a certain sum of money which was lesser than the decretal amount. The sale was confirmed and the immediate landlord of the holding thereupon applied for pre-emption under sec. 26F of the Bengal Tenancy Act and made the necessary deposit. The application for pre-emption was allowed. Thereafter an application for setting aside the sale under order 21 rule 90 was allowed *ex parte* and the sale was set aside. The landlord then applied for the refund of the money deposited by him. The court allowed his application and dismissed the application for pre-emption. Subsequently, the decree-holder made an application for setting aside the *ex parte* order whereby the sale had been set aside. In that proceeding the decree-holder and the judgment-debtor entered into a compromise whereby they agreed that the sale would be confirmed on the decree-holder discharging the judgment-debtor from the entire liability of the decree. The court allowed the application and the order confirming the sale was restored. Thereupon the landlord applied again for pre-emption and for redepositing the money which he had withdrawn, held that the effect of the revival of the order confirming the sale was to restore the order for pre-emption that had been made previously and the landlord was bound to deposit only the amount for which the holding was sold and the necessary compensation and not the entire decretal amount: *Chand Mia v. Maharaja Bir Vikramkishore Manikya Bahadur*, 42 C.W.N. 644.

20. Sub-Sec. (2) : "Value of the property" :—An applicant for pre-emption under sec. 26F cannot get relief without depositing the entire amount of consideration mentioned in the conveyance and the statutory compensation. The pre-emptor has to pay not only for the property but also for the structures on the property which are improvements. An application by a person who deposits only the price of the land and compensation thereon, without also depositing the price of the structures paid by the vendee, is not maintainable. The fact that the *kobala* or sale deed separately values the land and the structures, and that the latter are separable and can be easily dismantled will not make any difference: *Syed Abdul Hai v. Syed Abdur Rahman*, 39 C.W.N. 64; 60 C.L.J. 399; A.I.R. 1935 Cal. 258. Consideration money, as used in this section, is the amount paid by the purchaser for the price of the property sold, including improvements in the shape of structures though they may be separately valued, *Ibid*.

An applicant under sec. 26F is required under the law to deposit the entire amount of consideration or value of the property sold including all appurtenances, namely, structures on the holding and trees standing thereon: *Radhika Lal Goswami v. Satish Chandra Sen Mazumdar*, 62 Cal. 937; 39 C.W.N. 1300; 61 C.L.J. 299.

If the notice under sec. 26C of the Bengal Tenancy Act does not include the price of trees standing on the holding and transferred therewith but separately valued in the instrument of transfer, the landlord is not required, by virtue of the provisions of sec. 26F (2), to deposit the price of the trees also in order to be allowed to pre-empt, although the trees may be such as cannot be separately enjoyed. Trees standing on a holding are not incumbrances and the landlord cannot be required, under cl. (3) of sec. 26F, to deposit their price. The purchaser in such a case would, however, be entitled to remove the trees on the landlord pre-empting the land.

Apart from the propriety of the instructions issued by the Registration authorities, dated the 26th March, 1931, Note 5, they contemplate only huts or growing crops which can and are meant to be removed and enjoyed separately.

Structures standing on a holding which amount to improvements and trees which cannot be separately enjoyed are to be regarded as parts of the holding, the value thereof including the value of such structures or trees, and where the price of the latter is shown separately in the *kobala*, the landlord would be bound to deposit that amount also, provided, however, it is included in the notice under sec. 26C: *Rafballav Mondal v. Rajendra Narain Mondal*, 41 C.W.N. 317.

21. Sub-Sec. (2) : Time of deposit :—Where, on the due date, the landlords had filed their applications and were ready with the money to be deposited with challans in triplicate but for some reason or other, the challans could not be passed on that date but were passed on the next

working day, held, that the deposit was in time: *Jatindra Kumar Chakraborty v. Chandra Kumar*, 38 C.W.N. 616 : A.I.R. 1934 Cal. 661 : 153 I.C. 509.

Sec. 26F to be construed liberally.

Deposit need not be made with the pre-emption application but must be made within time.

Contrary view:

Deposit must be made with the pre-emption application, and if made subsequently but within time, pre-emption application liable to be dismissed.

Pre-emption application and deposit, if to be made simultaneously.

At the time of making it" in sub-sec. (2), meaning of.

What amounts to be paid for pre-emption.

Question of title.

Sec. 26F of the Act should be construed liberally. The intention of the legislature was that the deposit should be made within two months of the date of the notice in order to make the application purview of sec. 26F (2) of the Act. It is not necessary that the deposit should be made on the same day as application. An application is not liable to be dismissed on the ground that the deposit is not made that very day but is made only the next day. Provided both the application and deposit are made within two months of the date of the notice there is sufficient compliance with the section: *Sidheswari Prosad Roy Chowdhury v. Gendu Mia*, 61 C.L.J. 27. This case was decided in 1930.

An application by a landlord for pre-emption under sec. 26F must be accompanied with the deposit required by the law. Otherwise the application must be dismissed. It is not enough that the deposit subsequently made is within two months of the service of the notice on the landlord: *Girish Chandra Ghosh v. The Jadavpur Estates, Ltd.*, 39 C.W.N. 232 : 60 C.L.J. 576 : A.I.R. 1935 Cal. 389 : 156 I.C. 413 : (In this case, the decision in 61 C.L.J. 27 was not referred to).

The wording of the section is perhaps not happy and if the words used are taken as meaning that the application for pre-emption and the deposit should be made simultaneously that would amount to absurdity.

The expression, "at the time of making it" in sub-section (2) of sec. 26F, is to be given a liberal interpretation. The application must be brought to the notice of the Court, which has power to dismiss. The point of time, therefore, is not the time at which the application is presented to some officer of the Court, but it is the point of time at which the application is brought to the notice of the Court: *Jotis Chandra Biswas v. Jadu Nath Sikdar*, A.I.R. 1937 Cal. 377 : 173 I.C. 398.

Where an application for pre-emption was made on a Saturday, but the deposit could not be made within 1 P.M., although the landlord's officer came ready with the *chalan* and thereafter the deposit was made on the Monday following, that date also being within the period of limitation, held that there was sufficient compliance with sec. 26F (2), Bengal Tenancy Act: *Sk. Abu Bakkar v. Nripendra Nath Sen*, 41 C.W.N. 1212. In considering whether the requirement of sub-section (2) of sec. 26F as to making the deposit along with the application has been satisfied, regard must be had to the practical difficulties of depositing money in Court: *Ibid*. See also *Manilal Pal v. Gour Chandra Das*, 67 C.L.J. 80.

22. Sub-Secs. (2) and (3) :—Before a landlord could claim the right of pre-emption under sec. 26F, he should pay not only the actual consideration money or the value of the property, but any one or more of the three classes of sums set out in sub-sec. (3), including money spent in annulling encumbrances on the property. The application of the expression "annulling encumbrances" in sub-sec. (3) is not confined to cases such as are provided for in connection with sales in execution of decrees for rent: *Behary Lal Roy v. Pullin Behary Paul*, 38 C.W.N. 654 : A.I.R. 1934 Cal. 691 : 152 I.C. 480.

The enquiry in proceedings under sec. 26F is limited only to matters mentioned in sub-secs. (2) and (3). When there is nothing to show that the landlord applying for pre-emption knew that the tenancy was not an occupancy holding, the transferee is estopped from pleading or proving in proceedings under sec. 26F of the Bengal Tenancy Act that the property was not an occupancy holding as stated in the notice under sec. 26C but a residential property governed by the T. P. Act: *Mohini Mohan Mitra v. Radhusundari Dasi*, 39 C.W.N. 1014 : A.I.R. 1935 Cal. 481. Complicated question of title cannot be gone into and determined in pre-emption proceedings: *Nibaran Chandra Bhattacharya v. Hemnalini Debi*, 61 C.L.J. 310. See also *Kalimohon Pal v. Sachindra Mohon Roy*, 67 C.L.J. 5, where the question was raised but not decided.

23. Sub-Sec. (3) :—"Encumbrance" in sec. 26F (3), Bengal Tenancy Act, relates to all that is appurtenant to, and includes, structures standing on the land which is the subject of the tenancy: *Syed Abdul Hai v. Syed Abdur Rahman*, 39 C.W.N. 64 : 60 C.L.J. 399 : A.I.R. 1935 Cal. 258.

The transferee of an occupancy holding has no right to claim, under sec. 26F (3) of the Bengal Tenancy Act an unpaid mortgage debt due to himself and charged on the land sought to be pre-empted: *Benoy Kumar Basu Roy Chowdhury v. Sk. Eakub*, 42 C.W.N. 1110.

Encumbrance, in sec. 26F (3), meaning of.

Unpaid mortgage debt.

24. Sub-Sec. (4):—The application of a co-sharer landlord who has not been served with the notice of transfer to become a co-applicant in the application for pre-emption by another co-sharer landlord who has been served with notice, must be considered as an application for pre-emption under sec. 26F (1) of the Bengal Tenancy Act. As soon as such an application is made the remaining co-sharer landlords are entitled to become co-applicants, if they apply for being so made within one month of the application by the co-sharer not served with notice, even though they ask for pre-emption beyond one month of the application of the other co-sharer served with notice and beyond two months of the service of notice of transfer on them. It is not incumbent on a co-sharer landlord to exercise his right of pre-emption by becoming a co-applicant at the earliest opportunity, as soon as the first application for pre-emption is made by one of the co-sharer landlords: *Gadadhar Sarkhel v. Gopal Chandra Das*, 63 Cal. 1079 : 40 C.W.N. 680 : A.I.R. 1936 Cal. 343.

The whole scheme in the matter of deposits to be made by co-sharer landlords applying for pre-emption under the Bengal Tenancy Act, whether the application be under sec. 26F (1) or 26F (4) of the Act, seems to be that the deposit to be made by applicants or co-applicants must be made within the time limit imposed by the statute for making such application, though failure to deposit the amount along with the application would not be fatal. The deposit must however be made within the period of limitation prescribed by sec. 26F (4) (a). If the service of notice be delayed, i.e., of the application under sec. 26F (1), beyond one month by reason of the act or default of the applicant for pre-emption, his application for pre-emption would be thrown out on the ground of non-compliance with sec. 188. But if the notice be not served within that period by any act or omission or mistake of the Court or of its officers, the application of the co-sharer applicant under sec. 26F (1) would be a good one; and the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury done to them by its acts or defaults or those of its officers: *Sachindra Nath Chakravarty v. Trailakhya Nath Chakravarty*, 40 C.W.N. 1023 : A.I.R. 1936 Cal. 576.

25. Sub-Sec. (4) (a) :—A Court cannot extend the period for making a deposit by a co-applicant for pre-emption beyond the periods of time mentioned in clause (a) of sub-sec. (4) of sec. 26F : *Sachindra Nath Chakravarty v. Trailakhya Nath Chakravarty*, 40 C.W.N. 1023 : A.I.R. 1936 Cal. 576. The period of one month within which the co-sharer landlord has to apply to be joined as a co-applicant under the second alternative in sec. 26F (4) (a) of the Bengal Tenancy Act is to be counted from the date of the filing of the application under sec. 26F (1) and not from the date of service thereof : *Ibid*.

Where owing to the mistake of the Court, notice of a co-sharer landlord's application for pre-emption is not issued to the other co-sharer landlords within one month of the filing of the application, the Court has inherent power to set right the injuries caused to the rights of the co-sharer landlords and extend the time for joining as co-applicants as provided for in sec. 26F (4) (a) : *Gadadhar Sarkhel v. Gopal Chandra Das*, I.L.R. 63 Cal. 1079 : 40 C.W.N. 680 : A.I.R. 1936 Cal. 343.

Co-sharer landlords who are joined as parties defendants in an application for pre-emption made by other co-sharers but on whom, by the fault of the Court, notice under sec. 148A (2), Bengal Tenancy Act, is not served within one month of the application, must be allowed to pre-empt if they apply within a reasonable time from the service of the notice.

Vague evidence of knowledge of the application apart from the service of notice, particularly when there is no evidence as to knowledge of the date of the application, cannot disentitle such co-sharers from maintaining an application made within a reasonable time.

The right of pre-emption cannot be allowed to one of such co-sharers who has not applied for setting aside the Munsiff's order, refusing him such right : *Satish Chandra Banerjee v. Jogendra Krishna Banerjee*, 41 C.W.N. 674.

Sec. 26F does not state what share a co-sharer landlord coming in under clause (4) (a) is entitled to get. It would seem that in the ordinary course, co-sharer landlords applying to pre-empt should be entitled to the extent of equal shares or according to the interest in the superior right. Erroneous order for adjustment of shares set aside in revision : *Khosla*

Application to join as co-applicant in pre-emption proceeding.

Time for deposit, if can be extended. Period of one month to be counted from the date of filing the application. Notice not issued owing to Court's mistake, effect of.

Chandra Das v. Upendra Nath Ghosh, 35 C.W.N. 1058 : A.I.R. 1932 Cal. 220 : 136 I.C. 544.

A person who was not a co-sharer landlord at the time when the application for pre-emption was made but became one within the period of limitation stated in sec. 26F cl. (4) (a) is entitled to join as a co-applicant for pre-emption : *Khosal Chandra Das v. Upendra Nath Ghosal*, 35 C.W.N. 1058 : A.I.R. 1932 Cal. 220 : 136 I.C. 544.

Even when a co-sharer landlord is a transferee, he is to join as co-applicant in the application for pre-emption made by other co-sharer landlords and if he does not so join he shall not have any further power of purchase under sec. 26F : *Surendra Nath Nandi v. Sushila Bala Dasi*, 63 C.L.J. 49 : A.I.R. 1937 Cal. 47 : 167 I.C. 259.

A co-sharer landlord upon whom no notice under sec. 26C or 26F has been served may apply under sec. 26F (1) within a reasonable time of the date of his knowledge of the transfer. But that rule cannot be extended to applications under sec. 26F (4) (a) : *Mohomed Garib Hossain Mia v. Hallmannessa Bibi*, 62 Cal. 102 : 39 C.W.N. 1178.

When a co-sharer landlord of an occupancy holding purchases the holding, another co-sharer landlord is entitled to exercise his right of pre-emption in respect of the whole holding unless the purchaser co-sharer joins in the application under sub-section (4) (a) of sec. 26F of the Bengal Tenancy Act : *Sonamaddi v. Pramada Sundari*, 41 C.W.N. 1251 : A.I.R. 1937 Cal. 746 : 173 I.C. 481. See also *Surendranath Nandi v. Sushilabala Dassi*, 63 C.L.J. 49.

A co-sharer landlord A applying for pre-emption under sec. 26F (1) of the Bengal Tenancy Act, deposited the process fees and processes within the due time fixed by the Court but the notice was served by the Court on the other co-sharer landlord B after the expiry of one month of the application for pre-emption. The other co-sharer landlord B thereafter applied under sub-section (4) (a) of sec. 26F to join in the application for pre-emption but the Court rejected that application on the ground that it was not made within two months of the service of the notice under sec. 26C or within one month of the application for pre-emption. B did not move against that order but objected to the maintainability of A's application for pre-emption, on the ground of the rejection of his application to join as a co-applicant. The Court gave effect to this objection and dismissed A's application for pre-emption, *held* that in the circumstances A's application for pre-emption was not hit by sec. 188 of the Bengal Tenancy Act, and the order of the Court below dismissing his application was set aside. *Fazle Rahaman Prodhan v. Baharulla Prodhan*, 41 C.W.N. 444.

26. Sub-Secs. (1), (5) and (6) :—Certain co-sharers sold their share in an occupancy holding and getting notice of it the landlord filed an application for pre-emption under sec. 26F. Pending this application, another co-sharer of the transferors who had become a co-sharer by inheritance under Mahomedan Law, filed a suit for pre-emption to enforce the right under Mahomedan Law. Both the application and the suit were tried together. The suit was decreed, *held* that the landlord's application should be dismissed as there was no right, title or interest left in the vendees and as there could be no order for pre-emption against the co-sharer who had obtained the decree by reason of sec. 26F (1) : *Nalnaksha Dutta v. Abdul Jalil*, A.I.R. 1936 Cal. 389.

Pre-emption if can be allowed when landlord transfers his right before the order is made.

27. Sub-Sec. (5) :—Where a landlord, after his application for pre-emption but before an order under sub-sec. (5) of sec. 26F of the Bengal Tenancy Act is passed ceases to be the immediate landlord by reason of his creating a permanent lease of his share to realise rent from the tenant in favour of some other person, he is not entitled to get pre-emption : *Ramendra Nath Roy Choudhury v. Jitendra Nath Chakravorty*, I.L.R. [1938] 2 Cal. 85 : 42 C.W.N. 382 : 67 C.L.J. 76.

28. Sub-Sec. (6) : Effect of Order granting pre-emption application :—Under clause (6) of sec. 26F it is the intention of the legislature to put the landlord in the position of the auction purchaser as regards his rights and liabilities. In fact he becomes the legal representative of the auction-purchaser. So an application can be made under order 21, rule 100, C. P. Code, for disturbance of possession by the landlord who was put in possession under sec. 26F of the Bengal Tenancy Act : *Raja Risheekesh Law v. Jarial Mahapatra*, 36 C.W.N. 790 : A.I.R. 1933 Cal. 293 : 143 I.C. 141.

29. Sub-Sec. (6) cl. (iii) :—A judgment-debtor whose lands have been sold in Court auction is a trespasser when once the real owner (purchaser) gets actual possession of the lands through the Civil Court in pursuance of the orders of the Civil Court under Cl. (6) (iii) of Sec. 26 F and even if the judgment-debtor has grown crops on the lands, he has no right to remove them after the possession has been delivered. In the face of the order of the Civil Court delivering possession of lands to one-co-sharer landlord without objection from another it is not open to a Criminal Court to adjudicate upon the rights of the landlords as between themselves: *Osman v. Emperor*, 61 C.L.J. 586=A.I.R. 1936, Cal. 124=1936, Cr. C. 233 (1).

30. Sub-Sec. (8) : Pre-emption under the Mahomedan law not affected:—Where the parties are Mahomedans the general rule of pre-emption would accrue only after the property is transferred to another and not before: *Abdul Jalil v. Mahamuda Khalun*, 37 C.W.N. 848 : 58 C.L.J. 143 : A.I.R. 1934, Cal. 3 : 147 I.C. 1040.

31. Secs. 26F and 48H :—A lease registered under Sec. 48H is not a "transfer" in respect of which an application for pre-emption under S. 26F will lie: *Trailokya Nath Ghose v. Jajneswar Pal*, 38 C.W.N. 1004 : A.I.R. 1934 Cal. 821 : 152 I.C. 933.

32. Combined application under Secs. 26F and 26J :—A landlord can file a combined application under Secs. 26J and 26F by depositing the consideration money with 10 per cent compensation: *Narayan Chandra Banerji v. Kailash Chandra Chatlopadhyaya*, 59 Cal. 554 : 35 C.W.N. 1078.

33. Miscellaneous : Where deposit was made with the application for pre-emption within time, the application cannot be dismissed as defective merely because the deposit is withdrawn by holders of a decree against the applicant fraudulently. Sec. 26F contemplates two orders, one for pre-emption in favour of the applicant and a further order in favour of the purchaser: *Rakhal Das Som v. Saralabala Halder*, 40 C.W.N. 1182 : 66 C.L.J. 73.

Where in a proceeding under Sec. 26-F, B. T. Act, there was an objection that the tenancy was at a fixed rate of rent, and the application was allowed, leaving the question of the status of the tenant open, the fact that in the *kobala* by which the purchaser purchased the holding, there was no mention of the fixity of rent, and that the purchaser paid the landlord's fee at the time of the registration of the *kobala*, did not give rise to any estoppel against the purchaser in a suit by the latter for a declaration that he was a tenant at fixed rate of rent in respect of the holding: *Ferdinand Perier v. Kumar Krishna Nandy Choudhury*, A.I.R. 1936, Cal. 582.

26G. (1) An occupancy-raiyat may enter into a complete usufructuary mortgage in respect of his holding or of a portion or share thereof for any period which does not and cannot, in any possible event, by any agreement, express or implied, exceed fifteen years, and notwithstanding anything contained in this Act or in any other law or in any contract, no other form of usufructuary mortgage so entered into after the commencement of the Bengal Tenancy (Amendment) Act, 1928, shall have any force or effect.

Limitation on mortgage by occupancy-raiyat.

(1a) Notwithstanding anything contained in this Act or in any other law or in any contract, every usufructuary mortgage subsisting on or after the first day of August 1937, which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act, 1928, shall be deemed to have taken effect as a complete usufructuary mortgage for the period

Ben. Act VI of 1928.

mentioned in the instrument or for fifteen years, whichever is less.

(2) Notwithstanding any contract to the contrary entered into before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928, such a complete usufructuary mortgage, or a mortgage referred to in sub-section (1a), may be redeemed at any time before the expiry of the periods referred in sub-section (1) or sub-section (1a).

(3) Every such complete usufructuary mortgage entered into after the commencement of the Bengal Tenancy (Amendment) Act, 1928, shall be registered under the Indian Registration Act, 1908.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law, no document creating or purporting to create—

(a) a complete usufructuary mortgage of the holding or of a portion or share of the holding of an occupancy-raiyat for a period exceeding or which can exceed fifteen years, or

(b) an usufructuary mortgage of such holding, portion or share, other than a complete usufructuary mortgage,

shall be admitted to registration, nor shall any such document be received in evidence or acted on in any Court or by any public servant.

Provided that such a document executed before the commencement of the Bengal Tenancy (Amendment) Act, 1928, may be so received in evidence or so acted upon as a complete usufructuary mortgage for the period mentioned therein or for fifteen years, whichever is less.

(5) Notwithstanding anything contained in this Act or in any other law or in any contract, the consideration (with all interest thereon) for a complete usufructuary mortgage or for another form of usufructuary mortgage deemed under sub-section (1a) to have taken effect as a complete usufructuary mortgage, entered into by an occupancy-raiyat in respect of his holding or a portion or share thereof, shall be deemed to have been extinguished on the expiry of the period (a) mentioned in the instrument of the mortgage, or (b) of fifteen years, whichever is less,

from the date of the registration of the instrument, or where there is no registered instrument, from the date of the mortgagee's entry into possession, and the mortgagor shall thereupon become entitled to possession of the mortgaged holding, and he may, if he is not forthwith given possession, apply to the Court or to a Revenue-officer to be restored thereto:

Provided that, if in the case of such mortgage subsisting on or after the first day of August 1937, the said period has, on the date of the commencement of the Bengal Tenancy (Amendment) Act, 1938, already expired, the mortgagor shall, immediately on the commencement of the said Act, become entitled to possession of the mortgaged holding, but he shall not be entitled to, nor shall the mortgagee be liable for, any compensation in respect of the mortgagee's possession from the date of the expiry of the said period to the date of the commencement of the said Act.

Ben. Act IV
of 1938.

(6) *An application under sub-section (5) shall be accompanied by a process fee of the prescribed amount for service of notice on the mortgagee, and the Court or Revenue-officer to whom such an application is made, may, after service of such notice, award to the mortgagor such compensation as appears equitable in respect of the period during which the mortgagee retained possession after the date on which the mortgagor became entitled to be restored to possession and may pass an order restoring the possession of the land mortgaged to the mortgagor and such order shall have the effect of a decree of a civil court.*

1. Amendment :—The words in *italics* at the end of sub-sec. (1) were inserted by the B. T. (Amendment) Act VI of 1938. Sub-sec. (1a), proviso to sub-sec. (4), sub-secs. (5) and (6) are new, and were inserted by the said Act. The words in *italics* in sub-secs. (2) and (3) were also inserted by the said Act. The words, "no other form of usufructuary mortgage entered into by an occupancy-raiyat in respect of his holding or portion or share thereof shall have any force or effect, and" appearing in sub-sec. (4), after the words "in any other law" were omitted by the said Act. The Select Committee, appointed by the Council, recommended for extension of the period from 15 years to 25 years. An amendment was moved in the Council to reduce the period to 15 years as in the Bill, and the motion was agreed to.

2. Object of Amendment :—The object of the amendment was to give a retrospective effect with reference to mortgages entered into before 1928, but still subsisting. *The Revenue Minister,*

in support of the amendment, said, "There are innumerable instances in this Province where a poor tenant placed his lands, which is his little all in this world, under usufructuary mortgage for quite a large number of years. The mortgagee has been enjoying the usufruct of the land for several years and still the debt is not liquidated. It was considered a very great hardship and in the interest of the agriculturists this amendment was introduced. What is proposed by the Bill is that after 15 years the poor agriculturists will get back their land. * * There are cases where retrospective effect should be given in the wider interest of the community and the Government do feel that it is one of those instances where retrospective effect is perfectly justified."

3. "Complete Usufructuary mortgage":—See sub-sec. (3) of sec. 3.

26H. [*Transfer of rent-free holdings*]. *Repealed by the Bengal Tenancy (Amendment) Act (Ben. Act VI of 1938), s. 8.*

Object of Repeal. See notes under secs. 26C, 26D and 26F.

[Sec. 26H inserted by the Amending Act IV of 1928 ran as follows:—

Transfer of
rent-free
holdings.

26H. The fee payable by the transferee to the landlord for the transfer of a rent-free holding or of a portion or share of a rent-free holding of an occupancy-*raiyat* shall be two rupees and shall be paid in the manner provided in section 12 or section 13, as the case may be, and notice of the transfer of such holding, portion or share, shall be given to the landlord in the manner set forth in sub-section (3) of section 12, section 13 or section 15 according to the circumstances of the transfer.]

26-I. [*Interpretation and savings*]. *Repealed by the Bengal Tenancy (Amendment) Act (Ben. Act VI of 1938), s. 8.*

Object of Repeal:—See notes under secs. 26C to 26F.

[Sec. 26-I inserted by the Amending Act IV of 1928 ran as follows:—

Interpreta-
tion and
savings.

26I. (1) In sections 26C, 26D, 26F, 26H and 26J "transferee" includes the successors in interest of the transferee.

(2) In sections 26B, 26C, 26D, 26F, 26H and 26J "transfer" includes bequest but in sections 26C, 26D, 26F, 26H and 26J it does not include—

- (i) partition,
- (ii) lease or simple mortgage,

(iii) usufructuary mortgage, or

(iv) mortgage by conditional sale, until a decree or order absolute for foreclosure is made.

(3) In section 26E "purchaser" includes the successors in interest of the purchaser and "mortgagee" includes the successors in interest of the mortgagee.

(4) Neither the acceptance of the landlord's transfer fee provided in section 26D, 26E or 26J nor the making of an application to the Court under the provisions of section 26F shall operate as an admission of the amount of rent or the area or any incident of such occupancy holding other than the existence of a right of occupancy therein, or be deemed to constitute an express consent of the landlord to the division of the holding or to the distribution of the rent payable in respect thereof.]

26J. [*Landlord's transfer fee with compensation in certain cases of transfer.*] *Repealed by the Bengal Tenancy (Amendment) Act (Ben. Act VI of 1938), s. 8.*

I. Object of Repeal :—See notes under secs. 26C to 26F.

2. Effect of Repeal :—In respect of transfers of the holding of an occupancy-*raiyat* or a share or portion thereof the documents of which were executed and registered before the Bengal Tenancy (Amendment) Act VI of 1938 came into operation it appears that by virtue of such transfers the landlord acquired a vested right entitling him to recover the balance of the landlord's transfer fee and compensation as also the right to pre-empt as provided for by secs. 26J and 26F and as such he would be competent to continue any such proceeding started before the said amendment and also enforce his said right now by a suit if not otherwise barred, in spite of the repeal of sec. 26J and the substitution of the old sec. 26F by the new sec. 26F. See in this connection sec. 8 of the Bengal General Clauses Act (I of 1899), and the case law under the headings nos. 5 and 6 under the preamble at pages 9 to 11.

[Sec. 26J inserted by the Amending Act IV of 1928 ran as follows :—

26J. In cases where sections 26C and 26E apply—

(1) A transferee of the holding of an occupancy-*raiyat* or a share or portion thereof, whose instrument of transfer or sale certificate purports to transfer the interest of a permanent tenure-holder or of a *raiyat* holding at a rent or rate of rent fixed in perpetuity or of a rent-free holding shall, notwithstanding anything

Landlord's transfer fee with compensation in certain cases of transfer.

contained in the instrument of transfer, be liable to pay the landlord's transfer fee as provided in those sections.

(2) If such payment is not made, the landlord shall be entitled to recover the balance of the landlord's transfer fee, after deducting any amount paid as the landlord's fee under section 12, 13, 17, 18 or 26H together with such compensation as the Court thinks fit, not exceeding the amount provided in section 26D or 26E, as the case may be, as the landlord's transfer fee.

(3) The provisions of section 26F shall apply to the case of a transfer referred to in sub-section (1) and the immediate landlord shall be competent to exercise his rights of purchase under that section within two months of the date of payment into Court of the balance of the landlord's transfer fee and the compensation allowed.]

(Case law under sec. 26J.)

Headings of Notes

1. SUB-SEC. (2) : RECOVER.
2. QUESTION OF VALIDITY OF TRANSFER.
3. RESJUDICATA.
4. HOMESTEAD.
5. SUB-SEC. (2) : COMPENSATION.
6. SUB-SEC. (3) : "WITHIN TWO MONTHS OF THE DATE OF PAYMENT."
7. SECS. 26-J AND 111.
8. LIMITATION.
9. APPEAL AND REVISION

Suit does not lie for recovery of landlord's transfer fee.

Such a suit cannot be said to be impliedly barred.

Suit lies where case is not covered by Sec. 26j.

1. **Sub-Sec. (2) : "Recover"** :—A suit does not lie for the recovery of the landlord's transfer fee. The proper procedure is an application under sec. 26J : *Mahomed Ismail v. Lal Mia*, 37 C.W.N. 917 : A.I.R. 1933, Cal. 784 : 148 I.C. 14.

Where such a suit is filed the proper procedure is for the Court to treat it as an application under sec. 26J : *Ananda Prasad Ghose v. Ronendra Lal Chowdhury*, 40 C.W.N. 856 : 165 I.C. 715 : A.I.R. 1936 Cal. 342. By the provisions of sec. 26J a suit cannot be said to be impliedly barred so as to be not maintainable : *Ibid*.

Sec. 26J does not cover the case where the landlord is paid only a portion of the transfer fee due to him under sec. 26E and he claims to recover the balance of fee due to him. In such a case the power of the Court to entertain a suit for recovery of the balance of the transfer fee under the provisions of sec. 9 C.P.C. remains unaffected and has not been taken away by sec. 26J or by sec. 188 proviso (1) of the Act : *Sashi Kanta Acharya Bahadur v. Nasirabad Loan Office Co.*, 63 C.L.J. 105 : A.I.R. 1936 Cal. 786.

To recover the transfer fee the landlord has only got to show in a summary proceeding under sec. 26J that the holding is a raiyati-holding. No regular suit is necessary : *Srinath Bose v. Debendranath Bharati*, 36 C.W.N. 847. See also *Aghore Chandra Jalni v. Rajnandini Debi*, 60 Cal. 289 : 36 C.W.N. 924 : 58 C.L.J. 984.

2. Question of Validity of transfer :—When there has been a transfer in fact, the transferee who has accepted such transfer is bound under sec. 26C read with sec. 26J to pay the transfer fee to the landlord in full, whether the transfer has in law passed title to the transferee. The question whether the transfer is legal and operates to pass title is entirely foreign to the enquiry held by the Court under sec. 26J. All that is necessary to attract the operations of sec. 26J is that there must be a transfer in fact, i.e., the transfer must be accepted by the transferee. It is not necessary that the landlord should signify his acceptance of the transfer: *Sharfuddin Ahmed v. Jagadish Nath Ray Bahadur*, 63 Cal. 900; 40 C.W.N. 502; 63 C.L.J. 255; A.I.R. 1936 Cal. 304; 165 I.C. 426.

Enquiry as to passing of title, if permissible under Sec. 26J.

3. Resjudicata :—Where the character of a tenancy has been directly in issue between the parties on an application by the landlord under sec. 26J (2) of the Bengal Tenancy Act before a Munsif and the question has been decided by him against the transferee in adjudicating upon the landlord's claim for a higher transfer fee, a subsequent suit by the transferee before another Munsif for a declaration of his *mourashi mokurari* right in respect of the tenancy is barred by the principle of *resjudicata*. In a proceeding under sec. 26J the question of the character of the tenancy is not merely incidental or ancillary or subsidiary to the main question but is a matter directly in question between the parties: *Krishna Chandra Mukherjee v. Manik Lal Mukherjee*, 42 C.W.N. 793; 67 C.L.J. 363.

Decision as to character of tenancy on application under sec. 26J, if *resjudicata* barring subsequent suit by transferee.

There is no limitation on the doctrine of *resjudicata* that it does not apply to the result of a summary proceeding or a proceeding from the decision in which there is no appeal: *Ibid*.

A decision in favour of the landlord in a proceeding under sec. 26J is *resjudicata* on the question that on the particular transfer made, landlord's fee was payable on the footing that the subject-matter of the transfer was an occupancy holding. This decision cannot be set aside in a subsequent suit by the tenant. But the question whether the tenancy is always liable on a transfer to a transfer fee under secs. 26C or 26E is not *resjudicata* and a suit lies for a declaration that the tenancy is transferable without payment of the landlord's fee. No transfer fee under sec. 26C or 26E is payable on transfer of a holding in respect of which the landlord, by a special contract, gave the right of transfer to the tenant before the Bengal Tenancy Amendment Act: *Joy Chandra Bhowmik v. Kali Kinkar Nath*, 41 C.W.N. 149.

Declaratory suit that tenancy transferable without payment of landlord's transfer fee, if maintainable.

4. Homestead :—Sec. 26J applies to a homestead which is governed by the Bengal Tenancy Act by virtue of the provisions of sec. 182 of that Act, though the homestead may have been created before the Bengal Tenancy Act came into operation: *Taraknath Chakravarti v. Gangadhar De*, 38 C.W.N. 1061.

S. 26 J applies to homestead subject to sec. 182.

5. Sub-Sec. (2): Compensation :—Section 26J of the Bengal Tenancy Act no doubt permits the Court to grant compensation to the extent of the landlord's fee. The Court has got the power, but the amount of compensation in each case must depend on the circumstances of that case and must be considered by the Court. Where there are conflicting decisions as to the nature of the landlord, i.e., as to whether the holding is an ordinary holding or a holding at a fixed rent, and the contention of the purchaser is supported by decisions of Courts, the ends of justice would well be met by granting only nominal compensation: *Arjedali v. Sarbasona Dasht*, 40 C.W.N. 1279; 64 C.L.J. 51.

Amount of compensation depends upon the circumstances of each case.

6. Sub-Sec. (3): "Within two months of the date of payment" :—"within two months of the date of payment" in sub-sec. (3) of this section merely a provision extending the time within which the landlord may apply to pre-empt. A landlord may file a combined application under Secs. 26J and 26F by depositing the consideration money with 10 per cent. compensation: *Narayan Chandra Banerji v. Kailash Chandra Chattopadhyaya*, 59 Cal. 554; 35 C.W.N. 1078.

Sub-sec. (3): "Within two months of the date of payment." Combined application under Secs. 26J and 26F,

7. Secs. 26J and 111 :—Sec. 111 of the Bengal Tenancy Act is inapplicable to a proceeding under sec. 26J of the said Act and hence a proceeding under sec. 26J cannot be stayed under sec. 111: *Maharaj Bahadur Singh v. Bindode Behary Choudhury*, 63 C.L.J. 152. Simply because a defendant in a proceeding under sec. 26J raises the question of status which has to be gone into the proceeding under sec. 26J cannot be stayed under sec. 111: *Ibid*.

if maintainable. S. 111 not to sec. 26J proceeding.

Application under Sec. 26J governed by Art. 181. Appeal.

8. Limitation :—An application under sec. 26J is governed by Art. 181 of the Limitation Act and the period is 3 years under that Article : *Saktisaran Sinha v. Radha Raman Mandal*, 38 C.W.N. 50 : A.I.R. 1934 Cal. 396 : 149 I.C. 1134.

Revision.

9. Appeal and Revision :—An order in a proceeding under 26J is not appealable. A proceeding under 26J cannot be treated as one under sec. 158, so as to make the order an appealable one : *Raja Prithwchand Lal Chowdhury v. Elahi Bukshi*, 38 C.W.N. 1065 : 60 C.L.J. 104.

An order under sec. 26J can be interfered with in revision under sec. 155 C.P.C. : *Surendra Kumar Nandi v. Bepin Chandra Guha*, 38 C.W.N. 1001.

Regular suit

Section 26J of the Bengal Tenancy Act in terms only provides remedies to the landlord in the event of the raiyat making a false statement of his right to the land transferred. Whether or not the landlord can proceed by way of an application in cases where the payment of transfer fee is avoided by a false statement to the effect that the transferee is a relation by consanguinity within three degrees of the transferor or whether he has to institute a regular suit for the purpose, is a matter of some doubt. But assuming that a regular suit is necessary and that a Court entertains an application instead of demanding *ad valorem* Court fee as in a suit, it commits only a technical error which does not justify interference in revision, as no injustice can be said to be caused by such procedure : *Padma Lochan Mahato v. Baroda Kanta Mahato*, 63 C.L.J. 103.]

Enhancement of rent.

Enhancement of rent.

Presumption as to fair and equitable rent.

27. The rent for the time being payable by an occupancy-*raiyat* shall be presumed to be fair and equitable until the contrary is proved.

Notes :—Sec. 27 merely determines the question of burden of proof. All that it says is that the Court should not throw upon the landlord the onus of proving that the rent payable by the tenants for the time being is fair and equitable : *Hukumchand Sinha v. Jugal Kishwar Rai*, A.I.R. 1932 Pat. 203 : 138 I.C. 312.

Restriction on enhancement of money-rents.

28. Where an occupancy-*raiyat* pays his rent in money, his rent shall not be enhanced except as provided by this Act.

Enhancement of rent by contract.

29. The money-rent of an occupancy-*raiyat* may be enhanced by contract, subject to the following conditions :—

- (a) the contract must be in writing and registered;
- (b) the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*;
- (c) the rent fixed by the contract shall not be liable to enhancement during a term of fifteen years from the date of the contract:

Provided as follows—

- (i) Nothing in clause (a) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a

continuous period of not less than three years immediately preceding the period for which the rent is claimed.

(ii) Nothing in clause (b) shall apply to a contract by which a *raiyyat* binds himself to pay an enhanced rent in consideration of an improvement which has been or is to be effected in respect of the holding by, or at the expense of, his landlord, and to the benefit of which the *raiyyat* is not otherwise entitled; but an enhanced rent fixed by such a contract shall be payable only when the improvement has been effected, and except when the *raiyyat* is chargeable with default in respect of the improvement only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

(iii) When a *raiyyat* has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in clause (b) shall prevent the *raiyyat* from agreeing, in consideration of his being released from the obligation of cultivating that crop, to pay such rent as he may deem fair and equitable.

[**Note.**—Any contract entered into between a landlord and tenant providing for enhancement of rent on or after the 27th August, 1937 shall remain inoperative for 10 years with effect from that date. See sec. 75A inserted by the B. T. (Amendment) Act VI of 1938.]

Headings of Notes.

1. TO WHAT CASES THIS SECTION APPLIES AND TO WHAT CASES IT DOES NOT APPLY.
2. COMPROMISE OF SUIT CONTRAVENING PROVISIONS OF SEC. 29.
3. PROVISIO (i).
4. PROVISIO (ii).

I. To what cases this section applies and to what cases it does not apply:—Where there is no dispute as to the existing rent an agreement between the parties for enhancement of rent is still controlled by sec. 29 of the B. T. Act, and it cannot be out of the scope of sec. 29, merely on the ground that the agreement has

Where no dispute as to existing rent, agreement for enhancement

of rent, if
hit by s. 29.

been arrived at as the result of a settlement of *bona fide* dispute: *Makhan Lal Samaddar v. Khagendra Nath Chakravarty*, 63 Cal. 730: 40 C.W.N. 689.

Contract for
enhance-
ment of rent
contained in
petition of
compromise
extraneous
to suit, if
has force
of decree.

A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise. Such a term ought not to be made part of the decree of Court. A contract for enhancement of rent in contravention of sec. 29 of the Bengal Tenancy Act, contained in such a compromise does not become enforceable merely because it is made part of the decree passed on the compromise though ordinarily the consent decree is not void, but has to be avoided, and is valid until set aside. *Ibid.*

Bona fide
dispute as
to rate of
rent or as to
area of the
holding.

A landlord is not entitled to enhance the rent by agreement with, the tenant beyond the amount allowed by sec. 29, except in circumstances which are not really in violation of the terms of sec. 29, e.g., the settlement of a *bona fide* dispute as to the rate of rent and to avoid further litigation or in settlement of a *bona fide* dispute as to the area of the holding. No doubt where fresh lands have been added to a holding by encroachment or otherwise and the tenant has agreed to pay additional rent for the actual area the landlord is not bound by sec. 29 but in such cases he must prove that there has actually been an excess in the area of the holdings: *Ajad Bakat Mandal v. Rebaali Mohon Choudhury*, 57 C.L.J. 470.

Alteration
of rent for
alteration
of area.

Agreement
for enhance-
ment of rent
for changing
the status
of the
tenant
from occu-
pancy raiyat
to fixed
raiya, not
hit by
Sec. 29.

Tenants executed a *kabuliyat* agreeing to pay enhanced rent, by which rent was increased by more than two annas in a rupee and the status of the tenants was changed. The status of the tenants was changed from ordinary tenant to raiyats with permanent tenancy holding at fixed rent, *held*, that such agreement did not contravene the provisions of sec. 29 of the Act: *Reaz Ali v. Bijay Prakash Bajpai*, A.I.R. 1935 Pat. 453: 159 I.C. 449.

Contract to
pay enhance-
ment of rent on
future mea-
surement,
if hit by
Sec. 29.

Where a *kabuliyat* stated that the tenant was holding a *jama* of 40 bighas by guess at a rate of Rs. 1-10-0 per bigha, that he would go on paying the said rental but when the measurement would be next made and the quantity of lands would be ascertained the tenant would remain bound to pay rent at the highest rate paid by tenants of the same class holding neighbouring lands and on measurement the lands were found to measure 41 bighas and the rate was Rs. 4/-, *held* that the contract offended against sec. 29 of the Bengal Tenancy Act: *Sadananda Moral v. Basudeb Moral*, 57 C.L.J. 202. The landlord however had the right to enhance the rent provided he did not rely on the *kabuliyat* for that purpose. —*Ibid.*

Surrender
of part of
holding:
New hold-
ing.

Where a tenant surrenders to his landlord a large part of his holding in lieu of settlement of his claim for arrears of rent which the tenant has defaulted to pay, the holding comprising the part not surrendered becomes completely a new holding, and there is nothing in sec. 29 which requires that for a new holding of this nature the rent payable shall be exactly proportionate to what may have been payable for the larger original holding in respect of which the tenant has committed default: *Bhajan Kahar v. Jogesh Prasad Singh*, A.I.R. 1935 Pat. 358: 156 I.C. 123.

A contract by a non-occupancy raiyat for enhancement of rent does not come under sec. 29 by reason of his subsequently acquiring occupancy right: *Bepin Behary Sasmal v. Priya Nath Maity*, 60 Cal. 975: 37 C.W.N. 720. Cl. (c) of sec. 29 merely prevents the landlord from insisting on any further enhancement within 15 years but does not prevent the raiyat from making a second contract agreeing to pay an enhanced rent within that time: *Ibid*.

Contract by non-occupancy raiyat for enhancement of rent does not come under sec. 29 by reason of his subsequently acquiring occupancy right.

Where in a suit for rent at an increased rate on the ground of increase in area which is recorded in a *jamabandi* prepared on the basis of a survey made after the creation of the *jama*, it is found from the *jamabandi* and the record-of-rights that the rent fixed as payable at the time of the original settlement of the land on the tenant was calculated with reference to the basis rates for the various classes of land mentioned in the *jamabandi* and that the area of the holding was carefully ascertained and measured in terms of *bighas*, *cottas* and *chittaks*, and that the tenant, who has signed the *jamabandi* has actually paid the increased rate for some years, if the tenant pleads that the enhancement is illegal by relying on sec. 29 of the Bengal Tenancy Act, the onus is on him to prove that his *jama* has been actually held at a consolidated rent with reference to certain defined boundaries. It is not for the landlord to prove the contrary. If the tenant, however, fails to prove by satisfactory evidence that the settlement of the holding was a consolidated *jama* within specified boundaries, the landlord cannot as a matter of course get a decree for the increased rate. He must still prove that the area of the holding has actually increased since the settlement before he can get an increase under sec. 52 (1) (a) of the Bengal Tenancy Act: *Radharaman Chowdhury v. Purna Chandra Maitra*, 40 C.W.N. 1330.

Onus.

2. Compromise of suit contravening provisions of sec. 29 :

—A compromise decree passed in contravention of the provisions of sec. 29 cannot be treated in a subsequent suit between the same parties as without jurisdiction and a nullity but is operative and binding until vacated by appropriate proceedings: *Girish Chandra Singha v. Mahomed Rausan Mian*, A.I.R. 1933 Cal. 66: 141 I.C. 849. See notes under sec. 147A.

Compromise decree in contravention of sec. 29.

As to contract for enhancement of rent contained in petition of compromise extraneous to the suit, see *Makhan Lal Samaddar v. Khagendra Nath Chakravarti*, 40 C.W.N. 689.

Where a compromise by which the tenant bound himself to deliver so much wood in addition to the rent is embodied and is merged in a decree, it operates as an estoppel by judgment, although the stipulation might be in contravention of sec. 29 as an enhancement of rent: *Nagenbala Dasee v. Sridam Mahato*, 59 Cal. 513: A.I.R. 1933 Cal. 69: 141 I.C. 858.

3. Proviso (i) :—The effect of the first proviso to sec. 29(a)

is that a contract, if otherwise lawful, will not be defeated merely because it is not in writing and registered if rent has been regularly paid in accordance with it. But if the contract is *ab initio* illegal, that is to say, if it is a contract of a kind prohibited by sec. 29, cl. (b), then the proviso does nothing to validate it: *Reaz Ali v. Bijoy Prakash Bajpai*, A.I.R. 1935 Pat. 453: 159 I.C. 449.

Proviso (i) controls merely cl. (a) and not cl. (b).

4. Proviso (ii):—This proviso entitles the landlord to enhance the rent by more than 2 as. in the rupee if such enhancement is in consideration of an improvement. There is no necessity for registration of an improvement either under sec. 80 or sec. 33 of the Bengal Tenancy Act: *Madanmohan Choudhury v. Kali Charan Sirker*, 42 C.W.N. 126.

Enhancement of rent by suit.

30. The landlord of a holding held at a money-rent by an occupancy-*raiyat* may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds (namely):—

- (a) that the rate of rent paid by the *raiyat* is below the prevailing rate paid by occupancy-*raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there is no sufficient reason for his holding at so low a rate;
- (b) that there has been a rise in the average local prices of staple food crops during the currency of the present rent;
- (c) that the productive powers of the land held by the *raiyat* have been increased by an improvement effected by, or wholly or partly at the expense of, the landlord during the currency of the present rent; and
- (d) that the productive powers of the land held by the *raiyat* have been increased by fluvial action.

Explanation.—“Fluvial action” includes a change in the course of a river rendering irrigation from the river practicable when it was not previously practicable.

[**Note:**—All decrees and orders enhancing rent passed under any of the provisions of this Act on or after the 27th August, 1937 shall remain inoperative until the expiry of 10 years from that date. See sec. 75A inserted by the Bengal Tenancy (Amendment) Act VI of 1938.]

Headings of Notes.

- 1. CL. (a): PREVAILING RATE.
- 2. CL. (b): RISE IN PRICES OF STAPLE FOOD CROPS.
- 3. HOLDING.

I. Cl. (a): Prevailing rate:—The words “*prevailing rate*” in ‘Prevailing sec. 30, cl. (a) has a definite meaning. It is not average rent, nor fair rent. Primarily it means the customary rate of the locality, the rate at which lands in the locality are usually let out or at which persons desirous of taking settlement of lands can get the same. But in view of the circumstances, that, in most parts of Bengal, as a result of the economic theory of rent being put in practice there is found diversity in place of uniformity a secondary meaning has to be, and has been, given to the words “prevailing rate.” If a striking or decided majority of tenants of a locality pay one particular rate, that rate is to be taken as the prevailing rate of that locality. It is not necessary that the said majority must be paying absolutely the same rate—the rates paid must be very near the particular figure, infinitesimal variations being disregarded. In localities where there is not even this amount of uniformity but a standard has, according to the opinion of the Local Government, to be set up, the legislature has by sec. 31A given an artificial definition to the words “prevailing rate”, but that definition which fixes the prevailing rate on an area basis and not on the basis of the number of tenants cannot be invoked in places where sec. 31A has not been extended by notification by the Local Government. In such localities there would be no justification to a still greater degree to say that the prevailing rate is the rates at which, and at rates higher than which the majority of tenants pay rent: *Saroj Kumar Bose v. Alek Sheikh*, 62 C.L.J. 342: A.I.R. 1935 Cal. 771: 159 I.C. 685.

The existence of a lump rental does not take a holding out of the operation of sec. 30 (a). The basis of sec. 30 (a) is the division of the lands of a village into classes to each of which is attached a rate of rent: if a holding is held at a lump rental it must be the aggregate of the rents of the different plots computed in accordance with the rate appropriate to the class of each plot: *Bindeshwari Prasad v. Nankhu Mahton*, 11 Pat. 557: A.I.R. 1932 Pat. 179: 139 I.C. 537.

It is doubtful if a rate of rent based upon commuted rents can be said to exist within the meaning of sec. 30 (a): *Ibid*.

340 tenants occupying almost about the same number of bighas of land of the same quality and enjoying the same privileges paid rents at varying rates, held, that it could not be said that there was a prevailing rate of rent within the meaning of sec. 30 (a): *Jagdeo Narain Singh v. Tula Singh*, A.I.R. 1936 Pat. 54: 160 I.C. 1102.

Where the trial Court came to the conclusion on the basis of the commissioner's report that there was no prevailing rate, held, that the landlord could not claim enhancement under sec. 30, cl. (a): *Rameswar Singh Bahadur v. Soney Misser*, A.I.R. 1933 Pat. 529: 148 I.C. 1199.

A *kabuliyat* contained a stipulation to the following effect: “If the Government revenue due on the land is enhanced after the period of the lease, rent can be enhanced after taking into consideration the rate of rent for similar land with similar rights in the neighbourhood.” The landlord having sued for enhancement on the ground that the revenue had increased; held, that in considering the rate of rent payable in respect of land and with similar advantages, the time to be taken into account was the time of the Rate of enhancement: Stipulation in the *Kabuliyat*.

institution of the suit and not the time when the tenancy was created. The rate of rent payable by the tenant was to be enhanced without reference to the improvements effected by the tenant, and without reference to the civil importance of the town. If the prevailing rate cannot be determined, the Court would be justified in taking an average: *Hara Kishore Chakrabarty v. Iswar Chandra De Chowdhury*, 53 C.L.J. 608.

Where a document mentioned one contingency under which enhancement would be claimed, the landlord is not precluded from claiming enhancement of rent upon any other ground in the exercise of any right conferred on him by law after the contract: *Nabendra Kishore Roy v. Choudhury Mian*, 52 C.L.J. 583.

Where the holding in respect of which enhancement is claimed is a mixed one containing *dhanhar*-land and *bhit* land, only the lower of the rates is permissible: *Ram Brichh Lal v. Mahomed Saheb*, A.I.R. 1933 Pat. 542: 147 I.C. 789.

Where no
prevailing
rate is
found.

In a suit for enhancement of rent claimed under sec. 30 (a) Bengal Tenancy Act, if no prevailing rate is to be found in the village, the claim in suit must fail and the provisions of sec. 30 (a) cannot be applied to assess the land at the lowest rate paid for lands of similar description in the village: *Jagdeo Narain Singh v. Tula Singh*, A.I.R. 1937 Pat. 430: 170 I.C. 480.

'Present
rent' in
sec. 30 (b)
meaning of.

2. Cl. (b) : Rise in prices of staple food crops :—The Bengal Tenancy Act makes a distinction between enhancement of rent and alteration of rent on alteration of area. The right to recover additional rent for excess area is a recurring one and a landlord is entitled to exercise it whenever he finds it necessary to do so. There is nothing to prevent him from claiming back rent for any additional area in the use and occupation of the tenant, subject to the law of limitation, though in a proceeding for enhancement he cannot claim back rent. A decree obtained by the landlord under sec. 52 of the Act is one altering the rent, and such a decree does not preclude the landlord from claiming enhancement under sec. 30 (b) of the Act; nor can the date of the prior decree under sec. 52 be taken as the date from which the "present rent" is current within the meaning of sec. 30 (b). The words "during the currency of the present rent" in sec. 30 (b) must mean "during the currency of the rent which the raiyat has been actually paying or was liable to pay for the use and occupation of the land held by him." "Present rent" in sec. 30 (b) is used in the same sense as "previous rent" in sec. 32 (b) and "existing rent" in sec. 105 (4): *Satish Chandra Chakravarty v. Abdul Huque Sardar*, 40 C.W.N. 79: 62 C.L.J. 136.

The rise in prices contemplated in cl. (b) of sec. 30 is the rise over the prices which prevailed just at or about the time when the rent was fixed. It is assumed that the rent must have been fixed on the basis of the prices prevailing: *Ram Ranbijay Prasad Singh v. Ramgirhi Rai*, 14 Pat. 720: A.I.R. 1935 Pat. 346: 155 I.C. 902: 16 Pat. L.T. 333.

In a suit for enhancement of rent the landlord was entitled to an enhancement of rupees 0-3-9 per bigha but enhancement of only 1 anna was allowed by the Court on the principle of economic depression. The rent of the land was already low, *held*, that the principle of economic depression did not apply by reason of the

rent being low: *Jagdeo Narain Singh v. Tula Singh*, A.I.R. 1936 Pat. 54: 160 I.C. 1102.

To grant deduction of the whole rent for the permanently deteriorated area, and at the same time not to allow enhancement under sec. 30 (b) of the Bengal Tenancy Act in respect of the area in which there has been no deterioration would be a mistake in principle, especially when the outturn in the latter area is good. The holding is no doubt to be considered as a whole, but when a principle is adopted, it must be followed throughout. When the tenant is allowed complete remission of rent in respect of a portion of the holding on the ground that the land has become valueless, the landlord ought to have enhancement on the rent of the remainder of the holding at the rate found proper: *Srikant Rai v. Sheolagan Ahir*, A.I.R. 1934 Pat. 473: 15 Pat. L.T. 450.

Permanent deterioration of land: Basis of enhancement.

Plaintiff as *shebait* of a deity sued in 1932 for enhancement of rent under sec. 30 (b) of the Bengal Tenancy Act. The defendant contended that their tenures were *maurashi mokarari*. The record-of-rights which was finally published in 1922 recorded the tenancies as tenancies held at fixed rent and also contained a reference to the parties who created the tenancies in suit. The *pattas* which had been granted in 1847, 1878 and 1879, by the then *shebait* fixed in perpetuity; and the succeeding *shebait* accepted the *pattas* and recognised the tenancies as *maurashi mokarari*. Plaintiff, though aware of the entries in the record-of-rights as well as the *pattas*, alleged that the tenancies were occupancy tenancies and claimed enhancement on the ground that the prices of staple food crops had gone up, but did not challenge the *pattas* as not binding on him or on the deity, *held*, that the plaintiff not having challenged the *pattas* in the plaint, as he was bound to do, there was no obligation on the defendants to plead legal necessity or to adduce evidence to that effect, and that in any case legal necessity could be inferred from the fact that the *pattas* had not been challenged for a long number of years by the successors of the grantor of the *pattas* even in the absence of a recital in the *pattas* themselves of legal necessity. No enhancement could therefore be granted to the plaintiff: *Ram Kishore Das v. Kedar Panda*, 63 C.L.J. 22 (P.C.).

Mokurari patta by *Shebait*.

An agreement by a tenant with some of several joint landlords to pay separately to them a fixed amount on account of their share of the rent does not constitute a separate tenancy and does not in a suit for enhancement, relieve such co-sharer landlord from the bar imposed by sec. 188: *Deo Narayan Misra v. Bhajan Mahton*, A.I.R. 1932 Pat. 221: 137 I.C. 859: 13 P.L.T. 309.

Separate tenancy.

In a suit for enhancement of rent under sec. 30 (b), the fact that the suit lands are of bad quality, that the period of years on which calculation under sec. 32 was based include the years of post war economic disturbance when prices were unsettled and that the prices of all the commodities which a tenant has to purchase have risen higher than those of food crops are all immaterial and untenable for disallowing or reducing an enhancement: *Manna Kuer v. Ram Naresh Rai*, A.I.R. 1932 Pat. 61: 135 I.C. 107.

Post-war economic depression.

Unless the landlord is able to distinguish in lump rental the aggregate rent *bhit* and the aggregate rent for *dhanhar*, it is impossible to predicate that an enhancement exceeding the lower

of the two rates is not beyond the admissible maximum and therefore illegal. Where he has failed to indicate any particular portion of the lump rental as derived from the *bhit* land in respect of which the higher maximum rate of enhancement is allowable, no rate above the lower rate of enhancement can be certainly legal. A conjectural figure to be permissible must be within the limit of certain legality: *Bindeshwari Prasad v. Nankhu Mahton*, 11 Pat. 557: A.I.R. 1932 Pat. 179: 139 I.C. 537.

Case law under the old definition of 'holding'.

3. Holding :—In the case of a tenancy consisting entirely of undivided shares in parcels of land or partly of entire parcels of lands and partly of undivided shares in parcels of lands, sec. 30 cannot be combined with the definition of holding as amended so as to give the landlord the right to sue for enhancement of rent in respect of the tenancy created before Act IV of 1928 came into force. The amendment of the definition of 'holding' in 1928 has no retrospective effect: *Sripati Chandra v. Kailash Chandra*, 40 C.W.N. 984: 66 C.L.J. 93: A.I.R. 1936 Cal. 386 (on letters patent appeal affirming the decision appealed from, reported in A.I.R. 1936 Cal. 331). *The definition of holding has now been made retrospective in operation by the Amending Act VI of 1938. See notes under sec. 3 cl. (5) at p. 20.*

Though the word "land" is used instead of "holding" in sec. 105, sub-sec. 1 of the Bengal Tenancy Act, the rent of an undivided share of land which does not constitute a holding cannot be enhanced under sec. 30 of that Act in a proceeding under sec. 105: *Kumar Pratiba Nath Roy v. Bonomali Sarkar*, 35 C.W.N. 212. (*The definition of "holding" now includes also an undivided share*).

Rules as to enhancement on ground of prevailing rate.

31. Where an enhancement is claimed on the ground that the rate of rent paid is below the prevailing rate—

(a) in determining what is the prevailing rate the Court shall have regard to the rates generally paid during a period of not less than three years before the institution of the suit, and shall not decree an enhancement unless there is a substantial difference between the rate paid by the *raiyat* and the prevailing rate found by the Court;

(b) if in the opinion of the Court the prevailing rate of rent cannot be satisfactorily ascertained without a local inquiry, the Court may direct that a local inquiry be held under Order XXVI in Schedule I to, and section 78 of, the Code of Civil Procedure, 1908, by such Revenue-officer as the Local Government may authorize in that behalf by rules made under rule 9 in

Order XXVI in Schedule I to the said Code;

- (c) in determining under this section the rate of rent payable by a *raiyyat*, his caste shall not be taken into consideration, unless it is proved that by local custom caste is taken into account in determining the rate; and whenever it is found that by local custom any description of *raiyyats* hold land at favourable rates of rent, the rate shall be determined in accordance with that custom;
- (d) in ascertaining the prevailing rate of rent the amount of any enhancement authorized on account of a landlord's improvement shall not be taken into consideration;
- (e) if a favourable rate has been determined under clause (c) for any description of *raiyyats*, such rate may, if the Court thinks fit, be left out of consideration in ascertaining the prevailing rate;
- (f) if the holding is held at a lump rental the determination of the rent to be paid may be made by ascertaining the different classes of land comprised within the holding, and applying to the area of each class the prevailing rate paid on that class within the village or neighbouring villages.

Notes :—The expression “prevailing rate” contemplates a rate of rent which prevails in the neighbourhood generally and not merely in one neighbouring village or area of such village, least of all when in the latter case it is fortuitous. The Legislature had in view the normal circumstances of the neighbouring village as a whole and contemplated that it should be ascertained by the local inquiry whether there exists therein a definite customary rate per *bigha* for land of a similar description and with similar advantages to particular land of the holding in suit. If such a rate of rent does not exist in those villages for that class of lands, there is no prevailing rate for it in those villages such as is contemplated by sec 30 (a) and the landlord's application must fail. A rate of rent prevailing in one neighbouring village is not the prevailing rate for neighbouring villages: *Bindeshwari Prasad v. Nankhu Mahton*, 11 Pat. 557: 13 Pat. L.T. 244: A.I.R. 1932 Pat. 179: 139 I.C. 537. See notes under sec. 30.

‘Prevailing rate’, meaning of.

What may be taken in certain districts to be the "prevailing rate."

31A. (1) In any district or part of a district to which this sub-section is extended by the Local Government by notification in the *Calcutta Gazette*, whenever the prevailing rate for any class of land is to be ascertained under section 30, clause (a), by an examination of the rates at which lands of a similar description and with similar advantages are held within any village or villages, the highest of such rates at which, and at rates higher than which, the larger portion of those lands is held may be taken to be the prevailing rate.

Illustrations.

(a) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas.				Rs. A. P.
100	...	...	at	1 0 0
200	...	...	"	1 8 0
150	...	...	"	1 12 0
100	...	...	"	2 0 0
150	...	...	"	2 4 0
Total				700

Then Rs. 2-4 is not the prevailing rate, because only 150 *bighas*, or less than half, are held at that rate. Rs. 2 is not the prevailing rate, because 250 *bighas*, or less than half, are held at that or a higher rate. Re. 1-12 is the prevailing rate, because 400 *bighas*, or more than half, are held either at this or a higher rate, and this is the highest rate at which, and at rates higher than which more than half the land is held.

(b) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas.				Rs. A. P.
100	...	...	at	1 0 0
250	...	...	"	1 4 0
150	...	...	"	1 8 0
150	...	...	"	1 12 0
50	...	...	"	2 0 0
Total				700

Then for the reasons given in Illustration (a), neither Rs. 2 nor Re. 1-12 is the prevailing rate, nor is Re. 1-8 the prevailing rate, because only 350 *bighas* (exactly half) are held at Re. 1-8 or at rates higher than Re. 1-8. In this case Re. 1-4 is the prevailing rate, because more than half the lands are held at Re. 1-4 or higher rates and this is the highest rate at which, and at rates higher than which, more than half the land is held.

(2) The Local Government may, by a like notification, withdraw sub-section (1) from any district or part of a district to which it has been extended as aforesaid.

Notes :—The principle of sec. 31A cannot be applied to an area in respect of which the provision has not been notified : *Bindeshwari Prasad v. Nankhu Mahton*, 11 Pat. 557 : A.I.R. 1932 Pat. 179 : 139 I.C. 537. See also *Saroj Kumar Bose v. Alek Sheikh*, 62 C.L.J. 342 : A.I.R. 1935 Cal. 771. See notes under sec. 30. Sec. 31A.

31B. When the prevailing rate has once been determined by a Revenue-officer under Chapter X or by a Civil Court in any suit under this Act, it shall not be liable to enhancement save on the ground and to the extent specified in section 30, clause (b) and section 32. Limit to enhancement of prevailing rate.

32. Where an enhancement is claimed on the ground of a rise in prices— Rules as to enhancement on ground of rise in prices.

(a) the Court shall compare the average prices during the decennial period immediately preceding the institution of the suit with the average prices during such other decennial period as it may appear equitable and practicable to take for comparison;

(b) the enhanced rent shall bear to the previous rent the same proportion as the average prices during the last decennial period bear to the average prices during the previous decennial period taken for purposes of comparison : provided that, in calculating this proportion, the average prices during the later period shall be reduced by one-third of their excess over the average prices during the earlier period.

(c) if in the opinion of the Court it is not practicable to take the decennial periods prescribed in clause (a) the Court may, in its discretion, substitute any shorter periods therefor.

Decennial Periods :—S. 32 provides the machinery for finding out what enhancement should be allowed in case there is a rise in prices of staple food crops. Under cl. (a) the Court has to consider the average prices of two decennial periods, one of which must be the period immediately preceding the suit, and the other may be any one which is "practicable" to take. At the same time it must

'Practicable'
in cl. (a)
and cl. (c)
in s. 32,
meaning of.

be equitable to take that decade into consideration. "Practicable" means [both in cl. (a) and cl. (c)] the period for which figures are available or can be obtained without undue inconvenience or trouble. The Court can ordinarily take any period which it thinks equitable to take; and there is nothing in cl. (a) which enjoins upon the Court not to go to a period before the date when the rent was last fixed or settled. It would be more equitable to compare the prices of the decennium just before the institution of the suit with the prices which prevailed in the decade just before the settlement of rent. Shorter periods can be substituted for decades only if it is in the opinion of the Court impracticable to take the latter into consideration. Comparison between two decennial periods is obligatory, cl. (c) is an exception, which provides for cases where it will be impracticable to get the prices of two decades. But when there is a complete list of prices of staple food crops commencing from 1887, cl. (c) may, for all practicable purposes, be taken to be obsolete: *Ram Ranbijay Prasad Singh v. Ramgirhi Rai*, 14 Pat. 720: 16 P.L.T. 333: A.I.R. 1935 Pat. 346: 155 I.C. 902.

In considering what would be a fair and equitable enhancement, the Court should first ascertain what enhancement would be admissible on a strict reading of sec. 32; and should then proceed to consider whether such an enhancement would be fair and equitable. The comparison of the decennial period immediately preceding the settlements of these rents with the decennial period immediately preceding the suit is not the only or proper criterion. When there has been a considerable fall in prices, in late years, that circumstance has to be taken into account: *Rameshwar Prasad Singh v. Bihari Kahar*, A.I.R. 1935 Pat. 420: 156 I.C. 142: 16 Pat. L.T. 330.

Principle
of S. 32.

Scope of Sec. 32 :—Whatever be the basic principle of sec. 32, whether or not it is to be regarded as a means of preserving in a more or less constant condition of the landlord's share of the produce, the application of the rule is manifestly neither fair nor equitable in the present conditions, when the rent resembles a rack rent or does not leave a considerable margin of profit for the raiyat. On the strict application of the rule, Courts should be requiring the raiyat to pay more rent, because he may have realised profit from higher prices which prevailed 10 years before suit and 14 years ago, although the prices prevailing from the date of suit are less than half the prices on which the rent is to be assessed; so that the raiyat faced with conditions which make the payment of the existing rent difficult, is to be required to pay more. But sec. 35 which provides that no enhancement shall be allowed if it is not fair and equitable, saves the Civil Court from the necessity of applying the law in this absurd manner. Sec. 35 is thus a safeguard against such results as would follow from applying the strict provisions of sec. 32 in the present economic depression: *Kishore Lal Sinha v. Sant Pratap Singh*, A.I.R. 1935 Pat. 137: 156 I.C. 338: 16 P.L.T. 101.

Rules as to
enhance-
ment on
ground of
landlord's
improve-
ment.

33. (1) Where an enhancement is claimed on the ground of a landlord's improvement—

(a) the Court shall not grant an enhancement unless the improvement has been registered in accordance with this Act;

(b) in determining the amount of enhancement the Court shall have regard to—

- (i) the increase in the productive powers of the land caused or likely to be caused by the improvement,
- (ii) the cost of the improvement,
- (iii) the cost of the cultivation required for utilizing the improvement, and
- (iv) the existing rent and the ability of the land to bear a higher rent.

(2) A decree under this section shall, on the application of the tenant or his successor in interest, be subject to reconsideration in the event of the improvement not producing or ceasing to produce the estimated effect.

34. Where an enhancement is claimed on the ground of an increase in productive powers due to fluvial action—

Rules as to enhancement on ground of increase in productive powers due to fluvial action.

(a) the Court shall not take into account any increase which is merely temporary or casual;

(b) the Court may enhance the rent to such an amount as it may deem fair and equitable, but not so as to give the landlord more than one-half of the value of the net increase in the produce of the land.

35. Notwithstanding anything in sections 30 to 34, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable.

Enhancement by suit to be fair and equitable.

Scope of Sec. 35 : Enhancement to be fair and equitable :—

The facts and circumstances in each case have to be taken into consideration in determining the limit of enhancement so that it may not be unfair or inequitable to the parties concerned. The discretion so exercised in the matter of enhancement of rent should not be interfered with in second appeal, but it would not be right to say that discretion in the matter of enhancement of rent on the ground of its being fair and equitable could be exercised by the trial Court only and that it was not open to the final Court of fact to use its own discretion based upon facts and circumstances of the case before it: *Jagat Kishore Acharya v. Kamaruddin*, 60 Cal. 138 : 56 C.L.J. 279.

Discretion of Court : Facts and circumstances of each case to be considered.

The Court has, under sec. 35, discretion not merely to refuse enhancement of rent at the maximum rate but also to refuse enhancement altogether on the ground that the rents already assessed are

unduly high : *Hukumchand Sinha v. Jugal Kishwar Rai*, A.I.R. 1932 Pat. 203 : 138 I.C. 312.

"Fair and equitable" meaning of.

The rent paid by raiyats in settled areas are not economic rent as understood in Western Countries. The purpose of the Act is to maintain on the whole the proportions taken by the landlord and tenant respectively and not for the purpose of changing the proportions in accordance with any supposed economic or political considerations. The words "fair and equitable" refer to the maintenance of the proportion of the produce taken by the landlord in the form of money rent or corrections of the proportions to comply with the conditions prevailing under equal conditions within a given area : *Nathuni Thakur v. Ramsaran Singh*, 11 Pat. 654 (F.B.) : A.I.R. 1932 Pat. 225 : 139 I.C. 191.

Where the rent which has prevailed even when enhanced to the maximum decreed by the Court represents a proportion much below that paid under equal conditions within the area, it cannot be considered otherwise than as fair and equitable in the circumstances : *Ibid.*

Economic depression, if can be taken into consideration.

In a suit for enhancement of rent under sec. 30 (b) of the Act, the tribunal is entitled to take into consideration under sec. 35 the great economic depression with reduction in staple food crops prices, provided it is shown by evidence that in the particular circumstances of the case the economic depression will, if considered together with the proposed enhancement, disturb the proportions of the profits allotted to the landlord and the tenant respectively under equal conditions within the area covered by the enquiry and measured in money value up to the time of the suit. The consideration of decennial periods is a matter of procedure, compulsory it is true to the extent enacted, but it is not to be taken as being the only matter to be considered by the tribunal : *Ibid.*

General depression.

The general depression is a ground which is to be taken into consideration in applying sec. 35 ; but the effect of general depression in a particular case must be clearly established and decided : *Ram Bricch Lal v. Mahomed Saheb*, A.I.R. 1933 Pat. 542 : 147 I.C. 789.

Repair of irrigation works.

The tenant is liable to pay the existing rent only and is not liable for enhanced rent so long as the landlord does not carry out his duty as disclosed in the record-of-rights to keep the irrigation works in a proper state of repair. He may however renew his application after restoring the irrigation works to order : *Dhanukdhari Singh v. Syed Rafiqul Rahman*, A.I.R. 1933 Pat. 645 : 147 I.C. 506.

Plea of depression when not raised.

Where an enhancement of rent is allowed by the lower Court and the plea of depression has not been raised by the defendant before, it will be unjust for the High Court to remand the case for deciding this question. But the High Court can interfere and reduce the rate of enhancement allowed, if, on taking into consideration the prevailing depression, it considers the rent rather high : *Ram Bricch Lal v. Mahomed Saheb*, A.I.R. 1933 Pat. 542 : 147 I.C. 789.

Deposit of sand.

Where sand has been deposited on the holding, in the absence of evidence to show that the amount of sand deposited has adversely affected the productive power of the land, the tenants are not entitled to any relief on this ground : *Mukha Rai v. Nirmal Kumar*, A.I.R. 1934 Pat. 5 : 148 I.C. 203.

An enhancement made in 1901 was submitted to by the raiyat in return for a consideration of a fixed rent in perpetuity. In 1914 enhancement was claimed, *held*, that consideration of fixed rent in perpetuity having failed in and from 1914 it would be a reasonable claim on the part of the raiyat that the rises in the price of staple food crops should by no means be the only matter to be considered, that sec. 35 applied to the case, that the Court will at least require to have before it the rent payable in 1901, and the enhancement then made in return for the consideration that had failed, and that all relevant matters must be considered together: *Jugeswar Prasad v. Ramdhari Mahto*, 12 Pat. 820: A.I.R. 1933 Pat. 548: 148 I.C. 1109.

36. If the Court passing a decree for enhancement considers that the immediate enforcement of the decree to its full extent will be attended with hardship to the *raiyat*, it may direct that the enhancement shall take effect gradually at such times and by such instalments extending over a period not exceeding ten years as the Court may fix in this behalf. For the purposes of section 37, however, the full rent shall be deemed to have come into force from the date of the decree.

Power to order progressive enhancement.

37. (1) A suit instituted for the enhancement of the rent of a holding on the ground that the rate of rent paid is below the prevailing rate, or on the ground of a rise in prices, shall not be entertained if within the fifteen years next preceding its institution the rent of the holding has been enhanced by a contract made after the second day of March, 1883, or if a decree has been passed under this Act or any enactment repealed by this Act enhancing the rent on either of the grounds aforesaid or on any ground corresponding thereto or dismissing the suit on the merits.

Limitation of right to bring successive enhancement suits.

(2) Nothing in this section shall affect the provisions of rule 1 of Order XXIII in Schedule I to the Code of Civil Procedure, 1908.

Notes:—The bar of suit contained in the section does not apply to a dismissal of a prior suit for default in the payment of costs: *Parmeshar Missir v. Dhari Ahir*, 10 Pat. 105: A.I.R. 1930 Pat. 406: 125 I.C. 783.

Prior suit dismissed for default in payment of costs.

Reduction of rent.

Reduction of rent.

38. (1) An occupancy-*raiyat* may institute a suit for the reduction of his rent on one or more of the following grounds, and, except as hereinafter

Reduction of rent.

provided in the case of a diminution of the area of the holding, not otherwise (namely):—

- (a) on the ground that the soil of the holding has without the fault of the *raiyyat* become permanently deteriorated by a deposit of sand or other specific cause, sudden or gradual,
- (b) on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food crops during the currency of the present rent, or
- (c) on the ground that the landlord has refused or neglected to carry out the arrangements, in respect of the irrigation or the maintenance of embankments which were in force at the time when the rent was settled, and the soil of the holding has thereby deteriorated.

Explanation.—A suit for reduction of rent properly framed for the purpose may be instituted or a plea for reduction of rent taken by any one among a number of co-sharer tenants of a holding.

(2) In any suit instituted under this section, the Court may direct such reduction of the rent as it thinks fair and equitable.

[**Note** :—See new sec. 86A substituted by the B. T. (Amendment) Act VI of 1938.]

Headings of Notes.

1. SCOPE OF SEC. 38.
2. CLAIM FOR REDUCTION OF RENT IN RENT SUIT.
3. SUB-SEC. (1), CL. (a): 'PERMANENTLY DETERIORATED'.

Scope of
sec. 38 and
sec. 52.

I. Scope of sec. 38 :—Section 18 of the Bengal Rent Act of 1859 which provides for the abatement of rent in the case of an occupancy ryot in case of diluvion, or deterioration or otherwise, has since been split up and re-enacted in two separate sections, namely, sec. 38 and sec. 52 of the Bengal Tenancy Act of 1885. Sec. 38 provides for cases where the soil of the holding has, without any fault of the *raiyyat*, become permanently deteriorated by deposit of sand or other specific causes, sudden or gradual. Sec. 52 deals with cases where the whole or part of the tenant's land is lost to him by reason of diluvion or other similar causes. But while sec. 52 is general and applies to all classes of tenants, sec. 38 applies only to an occupancy tenant. Sec. 52 is more general than sec. 38 and applies even to a tenant holding under a *mokarari* lease: *Dukha Lal Choudhury v. Manabati*, 15 Pat. 594: A.I.R. 1936 Pat. 341: 163 I.C. 1003.

There is no warrant for holding that a tenant who holds under an *istimari mokarari* lease is entitled to claim reduction of rent on the ground that his land has permanently deteriorated or has become useless for cultivation. Nor can the principle of natural justice and equity be invoked for the purpose. Where the rent has been permanently fixed by contract, the rights and liabilities of the parties are regulated by contract, and when the terms of such a contract cannot be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. There is therefore no justification for extending the principles underlying sec. 38 to a tenant holding under an *istimari mokarari* lease, *Ibid.*

S. 38 does not apply to *mokarari* raiyat.

2. Claim for reduction of rent in Rent Suit :—The principle of sec. 38, Bengal Tenancy Act, applies not only to suits instituted by a tenant for abatement of rent but also to a plea for abatement of rent taken by a tenant in a suit for rent by the landlord, in which he is a defendant. The tenant is entitled to raise such a plea and what he has to show is permanent deterioration leading to failure of outturn: *Lal Behari Singh v. Mahabir Mahton*, A.I.R. 1936 Pat. 414: 163 I.C. 552.

Reduction may be claimed in rent suit.

It is not competent to a few out of a body of tenants of one holding to apply for abatement under s. 38 or to claim an abatement in defence to a suit for rent under that section; all the tenants must join in such an application: *Kesho Prasad Singh v. Mahesurdayal Misir*, A.I.R. 1933 Pat. 607: 148 I.C. 1087.

All the tenants must join in claiming abatement.

3. Sub-sec. (I) cl. (a): 'Permanently deteriorated' :—The word "permanent" must be read with reference to the circumstances of the case. The deterioration must be such deterioration as would continue to have effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by expenditure of capital and labour will not prevent its being regarded for the purposes of sec. 38 and similar provisions of law as a permanent deterioration: *Lal Behari Singh v. Mahabir Mahton*, A.I.R. 1936 Pat. 414: 163 I.C. 522.

'Permanently deteriorated' meaning of.

Under sec. 38 (a), permanent deterioration, to entitle the tenant to deduction of rent must be new in the sense that it must have occurred subsequent to the settlement of the existing rent. The conception of the words "permanently deteriorated" as equivalent to "permanently sterile" is erroneous; deterioration merely means becoming worse, which may present wide variations. In cases in which the land is only partially affected, the deterioration though giving a statutory claim to reduction, does not give a claim to remission of the rent altogether. The permanently deteriorated land should still carry a rent, but one corresponding to its depreciated value: *Srikhant Rai v. Sheolagan Ahir*, A.I.R. 1934 Pat. 473.

In calculating the amount of reduction to be allowed under sec. 38 (a), the principle laid down in sec. 52 (4) of the Act for reduction of rent on decrease in area of holding held at an aggregate rent, may be adopted, provided always that any difference in circumstances is not lost sight of. But the analogy, however, only operates completely when the permanent deterioration under sec. 38 (a) is

Principle of sec. 52 (4).

substantially equivalent to loss of the area and no rent at all ought to be payable. But such a contingency would be rare, as the raiyat continues to hold the land under the landlord, and some rent, however slight, would naturally be payable: *Ibid.*

A deterioration would not cease to be permanent if by the application of capital and skill the case of deterioration might be removed. The question of deterioration must be construed with reference to existing conditions: *Rameshwar Mandur v. Badri Sahu*, A.I.R. 1930 Pat. 105: 11 P.L.T. 470.

Price-lists.

Price lists
of staple
food crops.

Price lists.

39. (1) The Collector of every district shall prepare, monthly, or at shorter intervals, periodical lists of the market prices of staple food crops grown in such local areas as the Local Government may from time to time direct, and shall submit them to the Board of Revenue for approval or revision.

(2) The Collector may, if so directed by the Local Government, prepare for any local area like price lists relating to such past times as the Local Government thinks fit, and shall submit the lists so prepared to the Board of Revenue for approval or revision.

(3) The Collector shall, one month before submitting a price list to the Board of Revenue under this section, publish it in the prescribed manner within the local area to which it relates, and if any landlord or tenant of land within the local area, within the said period of one month, presents to him in writing any objection to the list, he shall submit the same to the Board of Revenue with the list.

(4) The price lists shall, when approved or revised by the Board of Revenue, be published in the official Gazette; and any manifest error in any such list discovered after its publication may be corrected by the Collector with the sanction of the Board of Revenue.

(5) The Local Government shall cause to be compiled from the periodical lists prepared under this section lists of the average prices prevailing throughout each year, and shall cause them to be published annually in the official Gazette.

(6) In any proceedings under this Chapter for an enhancement or reduction of rent on the ground of a rise or fall in prices, the Court shall refer to the lists published under this section, and shall presume that

the prices shown in the lists prepared for any year subsequent to the passing of this Act are correct and may presume that the prices shown in the lists prepared for any year prior to the passing of this Act are correct unless and until it is proved that they are incorrect.

(7) The Local Government shall make rules for determining what are to be deemed staple food crops in any local area and for the guidance of officers preparing price lists under this section.

40. [*Commutation of rent payable in kind.*] *Rep. by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 28.*

40A. [*Period for which commuted rents are to remain unaltered.*] *Rep. by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 29.*

CHAPTER VI

NON-OCCUPANCY-*raiyats*.

Application
of Chapter.

41. This Chapter shall apply to *raiyats* not having a right of occupancy, who are in this Act referred to as non-occupancy-*raiyats*.

Initial rent
of non-
occupancy
raiyat.

42. When a non-occupancy-*raiyat* is admitted to the occupation of land, he shall become liable to pay such rent as may be agreed on between himself and his landlord at the time of his admission.

Conditions
of enhance-
ment of
rent.

43. The rent of a non-occupancy-*raiyat* shall not be enhanced except by registered agreement or by agreement under section 46 :

Provided that nothing in this section shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed.

Grounds on
which non-
occupancy-
raiyat may
be ejected.

44. A non-occupancy-*raiyat* shall, subject to the provisions of this Act, be liable to ejectment on one or more of the following grounds, and not otherwise (namely) :—

- (a) on the ground that he has failed to pay an arrear of rent;
- (b) on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or that he has broken a condition consistent with this Act and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected;
- (c) where he has been admitted to occupation of the land under a registered lease, on the ground that the term of the lease has expired;
- (d) on the ground that he has refused to agree to pay a fair and equitable rent determined under section 46, or that the terms for which he is entitled to hold at such a rent has expired.

Notes : Cl. (c) :—The general object of the Act is the protection of raiyats. A person who has been a raiyat may be inveigled by his landlord from executing a lease imposing upon him no harder terms than he has hitherto borne but stating that the lease is to come to an end after a certain fixed period of time. The object of secs. 44(c) and 47 is to defeat this manoeuvre on the part of the landlord and for the purpose of counting the period of occupancy, the real period of occupation as a raiyat is to be taken into account and not the period of occupation stated in the lease. If therefore a defendant who is sued by his landlord in ejectment is able to show that in fact before the date of the lease he was a raiyat and in occupation of that same land in that capacity he is entitled to count the period of his occupation from the period when in fact he became in occupation as a raiyat. It is not, however, sufficient for the tenant to show that prior to his lease, he was in occupation if it was not as a raiyat: *Kesho Prasad Singh v. Ram Baran Chaubey*, 12 Pat. 23: A.I.R. 1932 Pat. 363: 140 I.C. 758.

In the case of a registered lease for a term of years the tenant would be liable to ejectment on the expiry of the term in accordance with the provisions of sec. 44 (c) provided he had been admitted to occupation under the lease. But where he is not let into occupation by the lease sec. 44 (c) does not apply: *Kesho Prasad Singh v. Jagdeo Lal*, A.I.R. 1933 Pat. 261: 149 I.C. 409.

Where a *kabuliyat* created a lease for a period of five years at a certain rent and provided *inter alia* that if no fresh settlement is taken by the tenant after the term he would continue to be a tenant as before, *held*, that the *kabuliyat* was a present demise for a further period of five years after the expiry of the first five years: *Bonomali Das v. Kamala Kanta Majumdar*, 39 C.W.N. 906.

Where the landlord brought a suit in ejectment under sec. 44, cl. (c) of the Bengal Tenancy Act and the defendant pleaded that he was holding under a confirmatory lease and he had acquired occupancy right, *held*, that on the facts of the case the lease was not a confirmatory one and the defendant as a non-occupancy raiyat was liable to ejectment under sec. 44 (c) on the expiry of the term of the lease: *Nirode Chandra Singha Sarma v. Sankar Chandra Saha*, 61 C.L.J. 189: A.I.R. 1936 Cal. 176.

45. (*Conditions of ejectment on ground of expiration of lease*). *Rep. in Western Bengal by the Bengal Tenancy (Amendment) Act, 1907 (Ben. Act I of 1907), s. 2, and in Eastern Bengal by the Eastern Bengal and Assam Tenancy (Amendment) Act, 1908 (E. B. & A. Act I of 1908), s. 2.*

46. (1) A suit for ejectment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy-*raiyyat* unless the landlord has tendered to the *raiyyat* a draft of an agreement to pay the enhanced rent, and the *raiyyat* has within three months before the institution of the suit refused to execute the agreement.

Object of
Sec. 44 (c).

'Admitted to occupation', in cl. (c), meaning of.

'Term of the lease.'

Confirmatory lease.

Conditions of ejectment on ground of refusal to agree to enhancement.

(2) A landlord desiring to tender a draft of an agreement to a *raiyat* under this section may file it in the office of such Court or officer as the Local Government appoints in this behalf for service on the *raiyat*. The Court or officer shall forthwith cause it to be served on the *raiyat* in the prescribed manner, and when it has been so served, it shall for the purposes of this section be deemed to have been tendered.

(3) If a *raiyat* on whom a draft of an agreement has been served under sub-section (2) executes the agreement and within one month from the date of service files it in the office from which it issued, it shall take effect from the commencement of the agricultural year next following.

(4) When an agreement has been executed and filed by a *raiyat* under sub-section (3), the Court or officer in whose office it is so filed shall forthwith cause a notice of its being so executed and filed to be served on the landlord in the prescribed manner.

(5) If the *raiyat* does not execute the agreement and file it under sub-section (3), he shall be deemed for the purposes of this section to have refused to execute it.

(6) If a *raiyat* refuses to execute an agreement of which a draft has been tendered to him under this section, and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding.

(7) If the *raiyat* agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement, but on the expiration of that term shall be liable to ejectment subject to the provisions of this Act unless he has acquired a right of occupancy.

(8) If the *raiyat* does not agree to pay the rent so determined, the Court shall pass a decree for ejectment.

(9) In determining what rent is fair and equitable, the Court shall have regard to the rents generally paid by *raiyyats* for land of a similar description and with like advantages in the same village.

(10) A decree for ejectment passed under this section shall take effect from the end of the agricultural year in which it is passed.

I. Scope of suit under this section :—The language of sec. 46 is inconsistent with the view that the landlord has not got the right to eject at the time the suit is brought. The provisions whereby a fair and equitable rent is to be settled and the tenant is to be allowed to come to an agreement to pay should be regarded as modifications of the right which the landlord had at the date he brought his suit. They are defences to the tenant. The landlord's right is not to be exercised until the tenant has had a chance to make such an agreement as will prevent the Court in its discretion from permitting the landlord merely on the ground of refusal to agree to his proposal, to have the tenant evicted from the land.

Acquisition of occupancy right after the institution of the suit and prior to the decree will not defeat the suit. Notwithstanding the acquisition of such occupancy right the tenant, if he refuses to pay the fair rent settled by the Court, will be subject to the right the landlord had at the institution of the suit, *i.e.*, subject to the decree of ejectment: *Kinu Gazi v. Kiranbala Debi*, 60 Cal. 990: 37 C.W.N. 586: A.I.R. 1933 Cal. 653: 145 I.C. 885.

2. Sec. 46 cl. (7):—The liability of a non-occupancy tenant to pay enhanced rent is not dependent on the decree which merely stops short after determining what the fair and equitable rent is. The liability attaches from the time when the tenant agrees to pay the rent so determined within the meaning sec. 46 cl. (7): *Port Canning and Land Improvement Co., Ltd. v. Asiruddi Molla*, 50 C.L.J. 8: A.I.R. 1929 Cal. 334.

47. Where a *raiyyat* has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation.

'Occupation of land :—For the purpose of counting the period of occupancy, the real period of occupation as a *raiyyat* is to be taken into account and not the period of occupation, if any, stated in the lease. But the tenant must show that he was in occupation of the land as a *raiyyat* (and not in some other capacity) before the *kabuliyat* and that the lease was executed with a view to continuance of that occupation, that is to say, occupation as a *raiyyat*: *Kesho Prasad Singh v. Ram Baran Chaubey*, 1933 Pat. 21: A.I.R. 1932 Pat. 363: 140 I.C. 758.

In suits for possession of land by the landlord, where sec. 47 is sought to be applied it is essential that the Court of fact should come to definite findings as to the time when the occupation of the tenant commenced and as to the nature of that occupation: *Kesho Prasad Singh v. Jagdeo Lal*, A.I.R. 1933 Pat. 261: 149 I.C. 409.

See notes under sec. 44 cl. (c).

CHAPTER VII

UNDER-RAIYATS.

Application
of Chapter
VII to all
under-
raiyats.

47A. The provisions of this Chapter shall apply to all under-*raiyats* whether their tenancies were created before or after the commencement of the Bengal Tenancy (Amendment) Act, 1928.

I. Amendment :—This section is new and was inserted by the B. T. (Amendment) Act VI of 1938, s. 9.

2. Object of Amendment :—The object is to give retrospective effect to the provisions of Chapter VII of this Act. The *Revenue Minister* said "What is sought to be conferred is to give retrospective effect with regard to certain rights conferred under Chapter VII on under-*raiyats*. Doubts were expressed in some of the High Court decisions as to whether these rights were conferred actually on under-*raiyats* created before 1928."

Liability of
under-*raiyat*
to pay rent.

48. When an under-*raiyat* is admitted to the occupation of land, he shall, subject to the provisions of this Act, become liable to pay such rent as may be agreed on between himself and his landlord at the time of his admission :

Provided that the rent or rate of rent agreed upon shall not be less than the rent or rate of rent payable by the *raiyat* to his landlord.

"Admitted
to the
occupation
of land",
meaning of.

I. Retrospective effect : "Admitted to the occupation of land" :—The opening words of this section, viz., "When an under-*raiyat* is admitted to the occupation of land," do not mean that the section applies only to under-*raiyati* created after the amending Act of 1928 came into operation. Where the period for which rent was claimed from an under-*raiyat* was after the amending Act of 1928 came into operation on the basis of a contract before that Act, held that the rights of the parties were to be governed by the new sec. 48 as the bar which was imposed by the old section had been removed: *Jodhan Prosad Vakati v. Haji Mahammad Yunus Moulvi*, 42 C.W.N. 992. See also *Digambar Paul Ghose v. Taffazuddin Ijardar*, 60 Cal. 1438: 37 C.W.N. 1033: 58 C.L.J. 76, where it was held that this section is not retrospective in operation and the position is that for the period in respect of which the cause of action arose before the amending Act came into force, the landlord of an under-*raiyati* is entitled to recover rent only as under the old section; but for any period in respect of which the cause of action arose after that date, he is entitled to recover rent as under the new section. See also *Ahmad Akanda v. Baharuddin Sheikh*, 40 C.W.N. 569, where it was held that old section 48 did not condemn the contract as bad, but simply prevented the landlord from recovering by suit at the contractual rate. By the repeal of that section that bar

has been removed. This section has no retrospective effect so as to apply to a case where the decision in the trial Court was given before the amendment, but the appeal was disposed of thereafter: *Taltan Bibi v. Mohadeb Mandal*, 36 C.W.N. 89.

2. Scope:—Sec. 48 applies to the case of an under-*raiyyat* without reference to the status of his landlord, who may be also an under-*raiyyat*: *Taltan Bibi v. Mohadeb Mandal*, 36 C.W.N. 89; where the under-*raiyyat* paid rent in kind or in the alternative in money at his option, sec. 48 applied: *Ibid*.

48A. The rent of an under-*raiyyat* shall not be enhanced except under the provisions of *sections 48B or 48D or section 48G, as the case may be.* Enhancement of rent of under-*raiyyat*

Amendment:—The words in italics "*sections 48B or 48D or section 48G, as the case may be*" were substituted for the words "section 48B or section 48D" by the B. T. (Amendment) Act VI of 1938, s. 10.

48B. (1) The money rent of an under-*raiyyat* may be enhanced by a written registered contract: Enhancement by contract.

Provided that the rent shall not be enhanced so as to exceed by more than four annas in the rupee the rent previously payable by the under-*raiyyat*, except in the following cases namely:—

- (i) When an under-*raiyyat* binds himself to pay an enhanced rent in consideration of an improvement which has been or is to be effected in respect of the holding wholly or partly at the cost of *his landlord* and to the benefit of which the under-*raiyyat* is not otherwise entitled, but an enhanced rent fixed by such a contract shall be payable only when the improvement has been effected, and except when the under-*raiyyat* is chargeable with default in respect of the improvement, only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.
- (ii) When an under-*raiyyat* has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord and the under-*raiyyat* agrees, in consideration of his being released from the obligation of cultivating that crop, to pay such rent as he may deem fair and equitable.

(2) The rent fixed by a contract under the provisions of sub-section (1), shall not be liable to enhancement during a period of fifteen years from the date of such contract.

Amendment:—The words in italics "*his landlord*" were substituted for the words "the raiyat" by the B. T. (Amendment) Act VI of 1938, s. 11.

Ejection
of under-
raiyat.

48C. An under-*raiyat* shall, subject to the provisions of this Act, be liable to ejection on one or more of the following grounds, and not otherwise, namely:—

(a) on the ground that he has failed to pay an arrear of rent:

Provided that, if the under-*raiyat* is one whose rent is payable in terms of cash and not of produce and he pays through the Court all arrears up to date together with such interest and damages as the Court may award, he shall not be liable to ejection on account of such arrears;

(b) on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or that he has broken a condition consistent with this Act and on the breach of which he is, under the terms of the contract between himself and his landlord, liable to be ejected;

(c) on the ground that the term of his lease has expired, when he holds the land under a written lease;

(d) on the ground that the tenancy has been terminated by his landlord by one year's notice expiring at the end of the agricultural year when he holds the land otherwise than under a written lease; or

(e) on the ground that he does not agree to pay the rent determined by the Court under sub-section (4) of section 48D:

Provided that an under-*raiyat* shall not be liable to ejection on the grounds specified in clause (c) or clause (d)—

(i) if the under-*raiyat* has—

(1) been admitted in a document by the landlord to have a permanent and heritable right to his land, or

(2) been in possession of his land for a continuous period of twelve years whether before or after or partly before and partly after the commencement of the Bengal Tenancy (Amendment) Act, 1928, or has a homestead thereon,

Ben. Act.
IV of 1928.

(ii) in the case of under-*raiyyats* other than those described in clause (i) of this proviso unless the landlord has satisfied the Court that he requires the land for his homestead or for cultivation by himself or by members of his family or by hired servants or with the aid of partners.

Headings of Notes.

1. RETROSPECTIVE EFFECT.
2. PROVISO (i) (2).
3. SECS. 48C (a) AND 66 (2).
4. ONUS.
5. COURT-FEES IN EJECTMENT SUITS.

1. Retrospective Effect :—Where an under-*raiyyat*, holding otherwise than under a written lease, was served with a notice to quit under the old-section 49 (b) of the B. T. Act, but thereafter before the date on which the under-*raiyyat* was liable to ejectment under the said notice, sec. 48C inserted by the Amending Act of 1928 came into force, *held* that the notice required under the new Act being different from the notice required under the old Act and there being no express provision in the new Act as to retrospective effect, the case would be governed by the old Act: *Jiban Krishna Chakravorti v. Abdul Kader Choudhury*, 60 Cal. 1037: 37 C.W.N. 689: 57 C.L.J. 477. See also *Joy Kumar Deb v. Jamiraddin*, 38 C.W.N. 105: 58 C.L.J. 466: *Kazi Masihuddin v. Bonde Ali*, 38 C.W.N. 167: 58 C.L.J. 468.

Sec. 48C is not retrospective and does not apply to a suit for ejectment of an under-*raiyyat* brought before the Amending Act of 1928 came into force: *Upendra Kishor Sarkar v. Khalil Fakir*, 55 C.L.J. 170. See also *Charubala Basu v. German Gomez*, 59 C.L.J. 66.

2. Proviso (i) (2):—Sec. 48C and proviso (i) (2) are not retrospective; an under-*raiyyat*, whose lease expired before the Amending Act of 1928 came into force, is not entitled to the benefit of proviso (i) (2) of this section and is liable to ejectment under the old section 49: *Jasada Kumar Roy v. Abdul Rahman*, 61 Cal. 962: 38 C.W.N. 841: 59 C.L.J. 528. Sec. 188, Bengal Tenancy Act, does not apply to a suit for the ejectment of an under-*raiyyat*, whose term has expired inasmuch as such a suit is to eject a trespasser: *Ibid*.

Under the proviso (i) (2) an under-*raiyat* is protected from ejectment if he has been in possession of the land for more than 12 years and it is not necessary that he should have been in possession as an under-*raiyat* for the whole period of 12 years. Where a person held the land as a service tenure for several years and subsequently became an under-*raiyat* of the said land proviso (i) (2) would be applicable if he had been in possession of the land for over 12 years: *Biswambar Chakravorty v. Kalidas Dhupi*, 40 C.W.N. 1275.

An under-*raiyat*'s liability for ejectment begins from the date on which ejectment notice expires, and in computing the period of 12 years' continuous possession the period covered by ejectment notice up to the date on which the said notice expires is to be included: *Kristo Kanta Ghosh v. Rajeswar Ghosh*, I.L.R. [1937] 1 Cal. 499: A.I.R. 1937 Cal. 656.

3. Secs. 48C (a) and 66 (2):—Defendants held an under-*raiyati* on the basis of a registered *kabuliyat* under which they had the option of paying their rent either in money or in kind. In a suit against them for ejectment and for recovery of the price of *bhag* produce, the defendants claimed the benefit of the protection given by sec. 48C (a), proviso and sec. 66 (2) of the Bengal Tenancy Act, *held*, that the defendants were entitled to the benefit of sec. 66, even if the proviso to sec. 48C (a) be not applicable: *Kashinath Mukerji v. Paban Chandra Manna*, 62 Cal. 427: 61 C.L.J. 12: A.I.R. 1936 Cal. 169. *Quære*—whether in view of the terms of the *kabuliyat* permitting payment in cash or kind, the defendants could claim the benefit of the proviso to sec. 48C (a): *Ibid*.

4. Onus:—In a suit under old sec. 49 (b) by a person claiming to be *raiyat* to eject an under-*raiyat*, the latter pleading that he is a *raiyat* and not an under-*raiyat* as alleged by the plaintiff, the onus of proving that the status of the defendant is that of an under-*raiyat* is on the plaintiff: *Surendra Nath Sen v. Ganesh Chandra Shaha*, 39 C.W.N. 1272.

Where the plaintiff sued to eject the defendant after serving him with notice to quit under old sec. 49, and where the plaintiff's title is admitted, the onus is on the defendant who claims to remain on the land to prove the existence of a right of occupancy or a permanent right: *Basanta Kumar Sarkar v. Panchcouri Mandal*, 57 C.L.J. 37: A.I.R. 1933 Cal. 459.

5. Court-fees in Ejectment Suits:—The proper Court-fee payable in a suit for ejectment of an under-*raiyat* is that on a year's rental: *Girish Chandra Dutta v. Girish Chandra Mali*, 54 C.L.J. 68. See sec. 7 (xi) (cc) of the Court-fees Act. See also *Govinda Kumar Sur v. Mohini Mohon Sen*, 57 Cal. 349: 33 C.W.N. 769, where it was *held* that a suit in ejectment against a person whose tenancy has been terminated by notice to quit is governed by sec. 7 (xi) (cc) of the Court-fees Act, and the word "tenant" in that section includes also an ex-tenant. See also *Girish Chandra Mali v. Girish Chandra Dutta*, 36 C.W.N. 190.

48D. (1) The landlord of an under-*raiyat* may, subject to the provisions of this Act, institute a suit to enhance the rent of the under-*raiyat*, and to eject the

under-*raiyat* if he refuses to pay the rent determined by the Court.

(2) The Court shall determine what rent is fair and equitable for the holding; provided that the rate of rent so determined shall not in the case of a money rent exceed one-third of the value of the average estimated produce of the land for the decennial period preceding the institution of the suit and in the case of a produce rent one-half of such produce.

(3) The Court shall thereupon inquire from the under-*raiyat* if he agrees to pay the rent so determined. If the under-*raiyat* agrees, he shall be entitled to remain in occupation of his holding at that rent for a term of fifteen years from the date of the agreement.

(4) If the under-*raiyat* does not agree to pay the rent so determined, the Court shall pass a decree for ejectment.

(5) A decree for ejectment passed under this section shall take effect from the end of the agricultural year in which it is passed.

Notes :—Where in a suit instituted under this section the decree was not drawn up in proper form after a preliminary order, held that though the decree might be made in an irregular manner the executing Court could not refuse to execute the decree: *Subal Chandra Jana v. Surendranath Bera*, 66 C.L.J. 33.

48E. When a *landlord* has ejected an under-*raiyat* on the grounds specified in clause (c) or clause (d) of section 48C, the under-*raiyat* may apply to the Court by which the decree for ejectment was passed to be put in possession of the holding from which he was ejected by way of restitution if, within four years of the ejectment, the landlord sublets the holding or any portion thereof; and thereupon the Court may, if satisfied after inquiry that the landlord did not use the land for his homestead, or for cultivation by himself or by hired servants or by members of his family or with the aid of partners, order a recovery of possession on such terms, if any, with respect to compensation to the persons injured as to the Court may seem just.

Application
for restitu-
tion by
under-*raiyat*

Amendment :—The word in italics "*landlord*" was substituted for the word "*raiyat*" by the Bengal Tenancy (Amendment) Act VI of 1938, sec. 12.

Incidents of holding of under-*raiyyat*.

48F. The holding of an under-*raiyyat* shall descend in the same manner as other immovable property, but *subject to the provisions of sub-section (2) of section 48G*, shall not be transferable except with the consent of the landlord.

I. Amendment :—The words in italics "*subject to the provisions of sub-section (2) of section 48G*," were inserted by the Bengal Tenancy (Amendment) Act VI of 1938, sec. 13.

2. Heritability of under-*raiyyati* holding :—Where, at the time of the institution of the suit, and the date when the new Act came into operation, an under-*raiyyati* had not been validly terminated, and the original under-*raiyyat*, claiming an occupancy right by custom, continued to be such as contemplated by sec. 48F, in respect of the land in suit, *held*, that the under-*raiyyati* became heritable by operation of sec. 48F, and consequently on the death of the under-*raiyyat* his heirs inherited the holding and were entitled to continue the appeal: *Rash Behari Mandal v. Ayesha Khatun*, 62 Cal. 73: 38 C.W.N. 1097: 60 C.L.J. 861.

Occupancy rights of under-*raiyyat*

48G. (1) Every under-*raiyyat* who, immediately before the commencement of the Bengal Tenancy (Amendment) Act, 1928, had by custom a right of occupancy in any land, shall have a right of occupancy in that land.

(2) Every under-*raiyyat* who has a right of occupancy in his holding shall have, as regards his immediate landlord, all the rights and liabilities of a *raiyyat* with a right of occupancy, as set forth in—

(i) Chapter V other than those conferred or imposed by sections 20, 21 and 22.

(ii) sections 65, 116 and 178, so far as possible, and

(iii) Chapter XIV,

and his holding, as against such landlord, shall be deemed to be the holding of an occupancy-*raiyyat* for the purposes of the said sections or Chapters.

(3) The interest of an under-*raiyyat* who has a right of occupancy in his holding shall not be deemed to be a protected interest under clause (d) or section 160.

(4) The provisions of sections 48A to 48E shall not apply to an under-*raiyyat* who has a right of occupancy in his holding, in so far as such provisions are inconsistent with this section.

I. Amendment —The words in italics "*and 22*" were substituted for the words "*22, 26A to 26J*" in cl. (i) of sub-sec. (2) of this section by the Bengal Tenancy (Amendment) Act VI of 1938,

sec. 14. The figure "86" in cl. (ii) of sub-sec. (2) of this section was omitted by the said Act.

2. Surrender:—See sec. 86 where the word 'under-raiyat' has been inserted by the Bengal Tenancy (Amendment) Act VI of 1938. All classes of under-raiyats are therefore now entitled to "surrender". See notes under sec. 86.

3. Sub-sec. (3):—This sub-section has no retrospective operation: *Sonatun Dafadar v. Daulat Gazi*, 36 C.W.N. 400: 55 C.L.J. 176.

48H. (*Provision as to selami*). Repealed by the Bengal Tenancy (Amendment) Act (Beng. Act VI of 1938), sec. 15.

[Sec. 48II inserted by the Amending Act IV of 1928 was as follows :

48II. (1) No lease to an under-raiyat for a term exceeding twelve years shall be registered unless a landlord's fee equal to twenty *per cent.* of the value of the leasehold created or five times the annual rent of the lessor, whichever is greater, together with the prescribed cost of transmission, a notice giving particulars of the lease in the prescribed form and the prescribed process fee for the service of such notice on the landlord or his common agent, if any, is paid to the Registering Officer.

Provisions
as to *salami*

Explanation 1.—When the lease comprises portion or a share of the lessor's holding the rent of that portion or share shall for the purpose of determining the landlord's fee under this sub-section bear the same proportion to the rent of the entire holding as the area or share sub-let bears to that of the entire holding.

Explanation 2.—A lease may include either a *patta* executed by the lessor or a *kabuliyat* executed by the lessee but where the landlord's fee has been paid for the *patta* it shall not be again payable for the *kabuliyat* and *vice versa*.

(2) The manner of transmission of the landlord's fee to the immediate landlord shall so far as possible be that provided in section 26C.

(3) The acceptance by the landlord of the landlord's fee provided in sub-section (1) shall not operate as an admission of the amount of rent or the area or any incident of the *raiyat's* or under-raiyat's holding, or be deemed to constitute an express consent of the landlord to the division of the holding or to the distribution of the rent payable in respect thereof.

1. Lease registered in contravention of the section, effect of :—Where an under-*raiyat* lease by an occupancy *raiyat* is registered in contravention of this section without payment of the landlord's fee, the lease becomes void as against the superior landlord: *Harendra Nath Mitter v. Hossainali Sana*, 42 C.W.N. 215. See also *Sukchand Halder v. Jogneswar Mandal*, 35 C.W.N. 974.

2. Suit for recovery of balance of landlord's fee if maintainable :—A suit for recovery of the balance of landlord's fee under this section is not maintainable: *Sukchand Halder v. Jogneswar Mandal*, 35 C.W.N. 974. See also *Harendra Nath Mitter v. Hossainali Sana*, 42 C.W.N. 215. The case of *Sukchand Halder v. Jogneswar Mandal*, 35 C.W.N. 974 was dissented from in the case of *Maharaja Sashi Kanta Acharya Bahadur v. Nasirabad Loan Office Company*, 63 C.L.J. 105, where at p. 109 it was held "if the landlord is not paid his legitimate dues certainly he has a right to seek assistance of the court to recover: *Ubi jus ibi remedium* is a well settled principle of law." See also comment in 35 C.W.N. 170 (notes) on the correctness of the decision in 35 C.W.N. 974.

3. Lease registered under this section if can be treated as sale and if there can be right of pre-emption :—It is not open to a landlord to treat a lease registered under this section as a transfer by sale and to apply for pre-emption under sec. 26F: *Troilakya Nath Ghose v. Jogneswar Pal*, 38 C.W.N. 1004.]

Mortgage
by under-
raiyat.

49. (1) Notwithstanding anything contained in section 48F, an under-*raiyat* may enter into a complete usufructuary mortgage in the same manner and on the same conditions as are provided in section 26G for occupancy-*raiyyats* and the provisions of that section shall apply so far as may be to under-*raiyyats* as if they were occupancy-*raiyyats*.

(2) Such mortgage shall not be binding upon the landlord of the under-*raiyat*.

Note : See the amendments of s. 26G by the B. T. (Amendment) Act VI of 1938.

CHAPTER VIIA.

RESTRICTIONS ON ALIENATION OF LAND BY ABORIGINALS.

49A. (1) This Chapter shall apply in the first instance only to the Sonthals of the districts of Birbhum, Bankura and Midnapore, who shall be deemed to be aboriginals for the purposes of this Chapter. Application of Chapter.

(2) The Local Government may, from time to time, by notification published in the *Calcutta Gazette*, declare that the provisions of this Chapter shall, in any district or local area, apply to such of the following aboriginal castes or tribes as may be specified in the notification, and that such castes or tribes shall be deemed to be aboriginals for the purposes of this Chapter, namely :—

Sonthals of other districts, Bhuiyas, Bhumijes, *Dalus*, Garos, Gonds, Hadis, Hajangs, Hos, Kharias, Kharwars, Kochs (Dacca Division), Koras, Maghs (Bakarganj District), Mal and Sauria Paharias, Meches, Mundas, *Mundais*, Oraons and Turis.

(3) The publication of a notification under sub-section (2) shall be conclusive evidence that the provisions of this Chapter have been duly applied to such castes or tribes.

(4) The Local Government may, by a like notification, declare that this Chapter shall, in any district or local area, cease to apply to the Sonthals mentioned in sub-section (1) or to any caste or tribe to which it may have been applied under sub-section (2).

(5) Notwithstanding anything elsewhere contained in this Act, the Local Government may, in the manner provided for in sub-sections (2) and (4), declare that the provisions of this Chapter applicable to aboriginal *rai-yats* shall apply so far as may be, or cease to apply to *rai-yats* within such colonisation areas in the Sundarbans as may be specified in the notification.

Amendment :—The words in italics "*Dalus*", and "*Mundais*" were inserted in sub-section 2 of this section by the B. T. (Amendment) Act VI of 1938, s. 16.

Restrictions
on transfer
of tenant
rights.

49B. No transfer by an aboriginal tenure-holder, *raiyat* or under-*raiyat* of his right in his tenure or holding, or in any portion thereof, by private sale, gift, will, mortgage, lease or any contract or agreement, shall be valid to any extent except as provided in this Chapter.

Lease by
tenure-
holder.

49C. An aboriginal tenure-holder may grant a lease to another aboriginal, to hold the land as a tenure-holder, or to cultivate it as a *raiyat*, in accordance with the provisions of this Act.

Sub-letting
by *raiyat*.

49D. An aboriginal *raiyat* may sub-let his holding to another aboriginal to cultivate it as an under-*raiyat*.

Amendment :—The opening words of this section "*Subject to the provisions of section 48H*" were omitted by the B. T. (Amendment) Act VI of 1938, s. 17. *Sec. 48H has been repealed by the said Act.*

Usufruc-
tuary mort-
gage by
tenure-
holder,
raiyat or
under-*raiyat*

49E. (1) An aboriginal tenure-holder, *raiyat* or under-*raiyat* may enter with another aboriginal into a complete usufructuary mortgage in respect of any land under his own cultivation, for any period which does not and cannot, in any possible event, by any agreement, express or implied, exceed seven years, or the period of his own right, whichever is less :

Provided that every mortgage so entered into shall be registered under the Indian Registration Act, 1908.

(2) An aboriginal tenant's power to mortgage his land shall be restricted to only one form of mortgage, namely, a complete usufructuary mortgage.

Application
to Collector
for transfer
in certain

49F. (1) If in any case—

(a) an aboriginal tenure-holder is unable to lease his land as provided in section 49C, or an aboriginal *raiyat* is unable to sub-let his holding as provided in section 49D, or an aboriginal tenure-holder, *raiyat* or under-*raiyat* is unable to mortgage his land to another aboriginal as provided in section 49E, sub-section (1), or

(b) an aboriginal tenure-holder, *raiyat* or under-*raiyat* desires to transfer his land, or any portion thereof, by private sale, gift or will to any person,

he may apply to the Collector for permission, in case (a), to transfer the same to a person who is not an

aboriginal, or in case (b), to transfer the same by private sale, gift or will to any person; and the Collector may pass such order on the application as he thinks fit.

(2) Every such transfer shall be made by registered deed, and before the deed is registered and the land transferred, the written consent of the Collector shall be obtained to the terms of the deed and to the transfer.

(3) Nothing in this section shall validate a transfer of any land or portion thereof which, by the terms upon which it is held, or by any law or local custom, would not be transferable except for the provisions of this section.

49G. No transfer by an aboriginal tenure-holder, *raiyat* or under-*raiyat* in contravention of the provisions of this Chapter shall be registered or in any way recognized as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction.

Courts not to register, or recognize as valid, transfers in contravention of this Chapter.

49H. (1) If a transfer of a tenure or holding, or any portion thereof, is made by an aboriginal tenure-holder, *raiyat* or under-*raiyat* in contravention of the provisions of section 49B, or if the transferee has continued or is in possession in contravention of the provisions of section 49E, sub-section (1), or section 49F, as the case may be, the Collector may, on his own initiative or on application made in that behalf, by an order in writing, eject the transferee from such tenure, holding or portion:

Power to Collector to set aside improper transfers by tenure-holder, *raiyat* or under-*raiyat*

Provided that—

- (a) the transferee whom it is proposed to eject has not been in continuous possession in contravention of this Act for twelve years, and
- (b) he is given an opportunity of showing cause against the order of ejectment.

(2) When the Collector has passed any order under sub-section (1), he shall either—

- (a) restore the transferred land to the aboriginal tenure-holder, *raiyat* or under-*raiyat*, or his heir or legal representative, or
- (b) failing the transferor or his heir or legal representative, declare that the right of settlement is vested in the landlord subject to the provisions of section 49J, provided that if the right is not exercised

within one year, the Collector may, within six months, settle the land on behalf of the landlord on such terms as he deems fit with an aboriginal; and, if the Collector is unable to make such settlement within the said period, an unrestricted right of settlement will vest in the landlord.

Resettle-
ment of
certain
tenancies.

49J. (1) Whenever—

(a) the right of settlement of any tenancy, or any portion thereof, is declared to be vested in the landlord under clause (b) of sub-section (2) of section 49H, or

(b) an aboriginal tenant surrenders his tenancy or a portion thereof, or abandons his residence and ceases to hold his tenancy,

the landlord may, subject to the provisions of sections 86, 86A and 87,—

(i) settle the tenancy, or a portion thereof, with an aboriginal, or

(ii) with the approval of the Collector in writing, settle the same with a person who is not an aboriginal or retain it in his own possession: provided that such approval shall not be withheld if the Collector is satisfied that the surrender or abandonment referred to in this sub-section is not made with the object of evading the provisions of section 49B, 49E or 49F.

(2) If any landlord resettles or otherwise deals with any tenancy as aforesaid in contravention of the provisions of sub-section (1), the Collector may take action, so far as may be, in accordance with the provisions of section 49H.

Restrictions
on sale of
tenant
rights under
order of
Court.

49K. Notwithstanding anything in this Act, no decree or order shall be passed by any Court for the sale of the right of an aboriginal tenure-holder, *raiyat* or under-*raiyat* in his tenure or holding, or in any portion thereof, nor shall any such right be sold in execution of any decree or order:

Provided as follows:—

(a) any tenure or holding belonging to an aboriginal may be sold, in execution of a decree of a competent Court, to recover an arrear

of rent which has accrued in respect of the tenure or holding;

(b) nothing in this section shall affect any right to execute a decree for the sale of any such tenure or holding, or the terms or conditions of any *bona fide* contract relating thereto, if such decree was passed, or such contract registered,—

(i) in the case of the Sonthals of the districts of Birbhum, Bankura and Midnapore, before the 1st November, 1916, and

(ii) in the case of other castes and tribes to which this Chapter has been applied, at least one year before the date of the publication of the notification under section 49A, sub-section (2), in respect to such castes or tribes;

(c) nothing in this section shall affect any right for the sale of any such tenure or holding for the recovery of any dues which are recoverable as public demands.

Notes :—The protection given by this section to a member of aboriginal tribes is not lost by a change of religion: *Karmoo Hansda v. Fanindra Nath Safen*, 41 C.W.N. 32.

Protection by s. 49K, if lost by change of religion.

49L. If the sale of a tenure or holding, or any portion thereof, is ordered in execution of a decree against an aboriginal tenure-holder, *raiyyat* or under-*raiyyat* in respect of such tenancy or portion thereof, the Court executing the decree shall allow the tenant reasonable time in which to pay the amount due.

Stay of execution of decrees.

49M. (1) An appeal, if presented within thirty days from the date of the order appealed against, shall lie to the Collector of the district from any order made under section 49F, 49H or 49J by any officer in the district exercising the powers of a Collector, and the order of the Collector on appeal shall be final:

Appeal and revision.

Provided that every order passed by the Collector on appeal shall be subject to revision and modification by the Commissioner.

(2) Notwithstanding anything in sub-section (1), an appeal from any order made under any of the sections mentioned in that sub-section by an officer acting

under Chapter X of this Act shall be to such officer as the Local Government may appoint in this behalf, and the orders of such officer on appeal shall be final :

Provided that, in every such case, every order passed by the said officer on appeal shall be subject to revision and modification by such officer as the Local Government may appoint to deal therewith.

(3) An appeal, as provided in sub-section (1), shall lie to the Commissioner from any original order made by the Collector of the district under any of the sections mentioned in that sub-section.

Bar to
suits.

49N. Notwithstanding anything in this Act, no suit shall lie in any Civil Court to vary or set aside any order passed by the Collector in any proceeding under this Chapter except on the ground of fraud or want of jurisdiction.

Saving of
certain
transfers.

49-O. Nothing in this Chapter shall affect the validity of any transfer (not otherwise invalid) by a tenure-holder, *raiyat* or under-*raiyat* of his tenure or holding, or any portion thereof, made *bona fide*, —

(a) in the case of the Sonthals of the districts of Birbhum, Bankura and Midnapore before the 1st November, 1916, and

(b) in the case of other castes and tribes to which this Chapter has been applied, at least one year before the date of the publication of the notification under section 49A, sub-section (2), in respect to such castes or tribes.

CHAPTER VIII.

GENERAL PROVISIONS AS TO RENT.

Rules and presumptions as to amount of rent.

*Rules and
presump-
tions as to
amount of
rent.*

50. (1) Where a tenure-holder or *raiyat* and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

*Rules and
presump-
tions as to
fixity of
rent.*

(2) If it is proved in any suit or other proceeding under this Act that either a tenure-holder or *raiyat* and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement :

Provided that if it is required by or under any enactment that in any local area tenancies, or any classes of tenancies, at fixed rents or rates of rent shall be registered as such on, or before, a date specified by or under the enactment, the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered.

(3) The operation of this section, so far as it relates to land held by a *raiyat*, shall not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding.

(4) Nothing in this section shall apply to a tenure held for a term of years or determinable at the will of the landlord.

Headings of Notes.

1. WHERE THE PRESUMPTION UNDER THIS SECTION APPLIES AND WHERE NOT.
2. REBUTTAL OF PRESUMPTION.
3. PERMANENT SETTLEMENT.
4. SECS. 50 AND 115.

Presumption under this section applies in cases under B. T. Act. Similar presumption may be applied in cases not under the said Act.

I. Where the presumption under this section applies and where not :—The presumption under this section arises only in cases under the B. T. Act. In cases arising out of suits under the general law a similar presumption may be applied : *Chitpore Golabari Co., Ltd. v. Hari Mohon Ghose*, 34 C.W.N. 675. Though the statutory presumption under this section does not arise in the case of suits, which are not under the B. T. Act, yet in such suits the principle underlying this section is a useful guide to the courts in determining the nature of a tenancy and a presumption similar to the one arising under this section may be drawn upon the facts and circumstances of the case : *Maharaja Bahadur Sir Prodyot Kumar Tagore v. Radha Kissen*, 42 C.W.N. 304. The mere fact of payment of rent at a uniform rate, in the absence of other circumstances, may not raise any presumption of fixity of rent or of permanency but the fact that a tenancy has been held at a low rate for a considerable number of years though the value of the land and with it the letting value thereof has increased to a great extent is an element which with other facts leads to an inference of fixity of rent and of permanency : *Ibid.*

Presumption applicable where rent partly in cash or partly in kind or entirely in kind.

Where in an agreement between a landlord and his tenant, the rent payable was fixed at a certain sum in cash and a certain amount of paddy and it was stipulated that the rent would not be altered on any account, *held* that the tenancy was at a rent fixed in perpetuity : *Tofazzal Ahmed Choudhury v. Masalat Khan Choudhury*, 38 C.W.N. 797. The presumption under this section is applicable to a tenure-holder or a *raiya* holding at a rent partly in cash or partly in kind or entirely in kind : *Ibid.* See also *Troilokya Nath Bhattacharya v. Bhupendra Nath Mukherji*, 58 C.L.J. 489.

Where at the time of the Permanent Settlement the rent of a holding is not "fixed in perpetuity", the tenants are not "raiya" holding at fixed rates." There is therefore no room for raising a presumption under sec. 50 by payment of the same amount of rent for a number of years : *Mohammad Yunas v. Bunsai Rai*, A.I.R. 1930 Pat. 379.

Presumption applicable where difference in rent is due to abatement on account of acquisition.

Where the tenant has not been paying uniform rent to the landlord but the difference in the rents paid is due only to abatement of rent on account of acquisition under the Land Acquisition Act and not due to any variation in the rent, the tenant is entitled to the presumption under sec. 50 : *Raj Nandini Devi v. Bhushan Chandra Sen*, A.I.R. 1936 Cal. 234 : 162 I.C. 694.

Nature of interest acquired by a tenant in land adjoining to land settled with him by his landlord depends on the circumstances and is not necessarily of the same kind as his interest in the latter. The presumption arising from the entry in record-of-rights that a tenant is one at a fixed rate is not affected merely because there are variations in rents of the originally settled land and lands acquired after : *Maharajadhiraj Sir Kameshwar Singh of Darbhanga v. Hem Nath Jha*, A.I.R. 1937 Pat. 127 : 167 I.C. 736.

Presumption not affected by amalgamation.

The presumption under this section is not affected by amalgamation of two or more holdings into one : *Lilabati Dasi v. Chitpore Golabari Co., Ltd.*, 42 C.W.N. 637. A person, who purchased a non-transferable occupancy holding and remained in possession in spite of objections by the landlord, is entitled to take such possession to that of the original *raiya* : *Ibid.*

Where a tenant relies upon a *mokurari patta* to prove fixity of rent, he is not precluded from invoking the presumption under this section if he fails to establish his case on the *patta*: *Surendra Nath Majumdar v. Haripada Sardar*, 39 C.W.N. 722: 61 C.L.J. 80.

In a suit under sec. 104H, when the entry in the record-of-rights in favour of the tenant is challenged, it is open to him to support its correctness by proof including the presumption under this section and 103B: *Kameshwar Singh Bahadur v. Bacha Koiri*, A.I.R. 1936 Pat. 446: 164 I.C. 98.

2. Rebuttal of Presumption :—In order that the presumption arising under this section may be rebutted, all that is necessary to be proved is that there has been a real change or variation in the rent or rate of rent. It is not necessary that it should be a substantial one. The amount of the variation is only one of the elements to be considered in determining whether there has been a real change. If there is a variation even of a small amount, and if the excess amount had been actually realised by the landlord, the fact will put an end to the presumption arising under this section: *Arjedali v. Sorbosona Dassi*, 40 C.W.N. 1279: 64 C.L.J. 51.

Variation need not be substantial.

In order to rebut the presumption arising under this section the change of rent though not substantial may be sufficient: *Jogendra Krishna Banerji v. Provash Chandra Laskar*, 57 C.L.J. 500: A.I.R. 1934 Cal. 37: 148 I.C. 163.

When the variation in rent is a small one or slight one, although unexplained, there is no rebuttal of the presumption which arises under this section or under the general law: *Prodyot Kumar Tagore v. Hirendra Nath Dutt*, 62 C.L.J. 551.

The absence of entry of tenancies in the books of account is evidence of their non-existence under sections 9 and 11 of the Evidence Act, but as to whether the absence of these entries is sufficient to rebut the presumption arising under this section, would depend upon the circumstances of each particular case; *Lilabati Dasi v. Chitpore Golabari Co., Ltd.*, A.I.R. 1937 Cal. 542: 174 I.C. 163.

Absence of entry of tenancy in books of account.

Where the landlord relied upon his collection papers for rebutting the presumption under this section, *held* that the absence of entry relating to the tenancy in the collection papers is evidence although its evidentiary value depends upon the facts and circumstances of the case: *Ananda Lal Chakravorti v. Narayan Chandra*, A.I.R. 1936 Cal. 481.

3. Permanent Settlement :—Where a question arises as to whether a tenant is entitled to a presumption under this section, the fact that the estate, wherein the tenancy is situate, was permanently settled in 1805 and not in 1793 does not make any difference: *Sanat Kumar Mukherji v. Narayan Chandra Ghosh*, 60 Cal. 1189: A.I.R. 1933 Cal. 926: 147 I.C. 507.

Permanent Settlement.

4. Secs. 50 and 115 :—In a case governed by the B. T. Act if the tenant is not permitted to avail himself of the provisions of sec. 50 by reason of the provisions of sec. 115 of the Act, he cannot fall back upon any presumption of fixity of rent apart from this section: *Srimanta Chattopadhyay v. Khararia Mejozilla Zemindery Syndicate Ltd.*, 55 C.L.J. 91.

Presumption as to amount of rent and conditions of holding.

51. If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year.

Notice to quit from tenancy by holding over, if necessary when lease provided no such notice.

1. Holding over : Notice to quit :—Where there was a term in a lease that the lessee would be ejected without service of notice to quit, and on the expiry of the term mentioned in the lease, the lessee held over and the landlord accepted rent, *held* that as the rent was accepted it was a new contract of tenancy from year to year and the term as to notice was not carried over to the new lease and that notice was necessary to eject the lessee holding over: *Dasarathi Kumar v. Sarat Chandra Ghose*, 37 C.W.N. 971.

Option to the lessee for renewal of lease : no time fixed : Lessor, if bound to give notice to lessee for exercising option.

2. Option of renewal : No time fixed :—Where a lease for a certain term confers an option to the lessee for renewal of the lease but no time is fixed within which such option is to be exercised and the lessee, after the expiry of the term, continues in possession the mere fact that the original term has expired, in the absence of any circumstance suggesting a waiver or refusal does not determine the relationship between the parties. In such a case, the landlord before he can treat the lease as determined and grant a fresh lease to a third party, is bound to give notice to the original lessee for exercising his option of renewal: *Maharani Hemanta Kumari Debi v. Sefatulla Biswas*, 37 C.W.N. 9: A.I.R. 1933 Cal. 477: 144 I.C. 889.

English common law as to holding over.

3. Holding over : English Common law :—The doctrines of English Common Law as to holding over are not applicable to their whole extent to cases under the Bengal Tenancy Act: *Gopal Chandra Rudra v. Khater Karikar*, 33 C.W.N. 1207.

Alteration of rent on alteration of area.

Alteration of rent on alteration of area.

Alteration of rent in respect of alteration of area.

52. (1) Every tenant shall—

(a) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made; and

(b) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him,

unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

(2) In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

- (a) the origin and conditions of the tenancy, for instance whether the rent was a consolidated rent for the entire tenure or holding;
- (b) whether the tenant has been allowed to hold additional land in consideration of an addition to his total rent or otherwise with the knowledge and consent of the landlord;
- (c) the length of time during which the tenancy has lasted without dispute as to rent or area; and
- (d) the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit.

(3) In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description, and with similar advantages in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure, and shall not in any case fix any rent which, under the circumstances of the case, is unfair or inequitable.

(4) The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding.

(5) When in a suit under this section the landlord or tenant is unable to indicate any particular land as

held in excess, the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area.

(6) When in a suit under this section the landlord or tenant proves that—

(i) at or about the time when the area was recorded in any *patta* or *kabuliyat* there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situated a practice of settlement being made after measurement of the land assessed with rent, or,

(ii) the area entered in the counterfoil receipts corresponds with the area in the rent-roll on which the claim is based and that a practice of settlement on measurement prevailed at the time when the rent-roll was prepared,

it shall be presumed that the area of the tenure or holding was settled by measurement.

Amendment proposed in the Legislature: Act VI of 1938:

—See notes under new section 75A. In the B. T. (Amendment) Bill, 1937, sec. 52 was excluded from the proposed section 75A. The Revenue Minister moved for substitution of section 75A, by including also sec. 52: *New sec. 75A*, as moved by the Revenue Minister in the Assembly, with amendments as agreed to by the Council, was passed by the Legislature. The words “including sec. 52” were omitted from sec. 75A in pursuance of the Governor’s Message under sec. 75 of the Government of India Act, 1935. See the Governor’s Message and notes under heading no. 1 at pages 2 and 3.

[**Note**:—For the proposed Bill [B. T. (Third Amendment) Bill, 1938] for amending sec. 52 of that Act, see *Calcutta Gazette*, 22nd September, 1938, Part IVB. See the proposed Bill printed in the Appendix at the end of this book.]

Headings of Notes.

1. SUB-SEC. (1) (a): “PROVED BY MEASUREMENT”: “EXCESS”.
2. SUB-SEC. (1) (a): “AREA FOR WHICH RENT HAS BEEN PREVIOUSLY PAID”.
3. SUB-SEC. (1) (b).
4. SUB-SECS. (3) AND (4).
5. SUB-SEC. (4).
6. LAND WITHIN DEFINED BOUNDARIES.
7. ASSESSMENT OF RENT UPON CONTRACT.
8. CLAIM FOR ADDITIONAL RENT UPON CONTRACT AND SEC. 52.
9. ENCROACHMENT.
10. STANDARD OF MEASUREMENT: PRESUMPTION.

11. BURDEN OF PROOF.
12. DISPOSSESSION OF TENANT.
13. SUB-SEC. (6).
14. HOLDING.
15. BACK RENT.
16. 10 P.C. DEDUCTION.
17. MISCELLANEOUS.

I. Sub-sec. (1) (a): "proved by measurement": "Excess". "Proved by measurement": "Excess."
—The words "proved by measurement" in sec. 52 have reference only to the quantity of land held in excess, not to the old area as well as the new area. The "excess" contemplated is excess over the area by reference to which the previous rent was fixed and such area may have been an assumed area as much as an area determined by measurement so that it is possible for sec. 52 to apply even though there has been no actual increase of area, if a smaller area was the basis of the previous rent. But it is necessary to prove that the previous rent was actually fixed by reference to area whether supposed or ascertained by measurement, and this is not proved merely by the mention of both area and rent in the *kabuliyat*. Sec. 52 does not apply when the rent previously paid was a consolidated rent for the whole holding and not by reference to area, though the latter may have been determined by measurement and stated in the lease: *Nanda Kishore Lal v. Dwarka Nath Sinha*, 42 C.W.N. 276: A.I.R. 1937 Cal. 632.

The landlord's case does not depend on his being able to prove what had happened at the inception of the tenancy. If he can show that when rent was last assessed it was on the basis of certain area and that the tenant is in possession of land on which no rent was assessed at the time, then he is entitled to increase of rent: *Mana Kuer v. Ram Naresh Rai*, A.I.R. 1932 Pat. 61: 135 I.C. 107.

2. Sub-sec. (1) (a): "Area for which rent has been previously paid":—The words "area for which rent has been previously paid" mean the area with reference to which rent was assessed or adjusted. In order therefore to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception, and in order to determine whether the landlord is entitled to additional rent the question which has to be solved is whether the tenant is in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the date of the last assessment he has encroached on adjoining waste of the landlord he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that that rent was not assessed at a consolidated sum upon the entire area found in his possession but upon an assumed area or upon an area determined by measurement as the area in his possession: *Gopal Chandra Chanda v. C. K. Nag & Co., Ltd.*, A.I.R. 1936 Cal. 375.

3. Sub-sec. (1) (b):—Just as the landlord under sec. 52 must prove his right to additional rent for excess land, so the tenant must prove his right to a reduction of rent in respect of deficiency. If a tenant after diluvion wants to get rid of his landlord's *prima facie* right to the full rent, he may bring his suit for abatement of diluvion. Tenant to prove his right to reduction of rent and extent of diluvion.

rent and upon proof of the extent of the diluvion his liability will be reduced. If he does not choose his course, then he can still plead and prove the fact and the extent of the diluvion as a partial defence to a suit for the full rent, he can make no grievance of the fact that the landlord claims it from him. At the one time or other it is for the tenant to show what he has lost and that he has been partially discharged from the liability which he assumed as tenant: *Kumar Arun Chandra Singha v. Bhagaban Chandra Roy Choudhury*, 59 Cal. 155 (F.B.): 35 C.W.N. 1011: 54 C.L.J. 31: A.I.R. 1931 Cal. 537: 133 I.C. 577.

Part of
tenancy
covered by
sand :

If a part of the land of a tenancy is covered up by sand so as to become wholly useless, the tenant is entitled to a proportionate reduction of rent unless the landlord proves circumstances which disentitle the tenant to such reduction: *Achala Dassi v. Bejoy Chand Mahtab*, 38 C.W.N. 974: 59 C.L.J. 491.

The right to abatement of rent which the tenant obtains by the destruction of the whole or part of his tenancy will remain so long as the land is uncultivable and covered with sand and the rent cannot be assessed at a fair rate on the ground that land can be used for a less profitable purpose: *Dukhalal Chaudhury v. Mt. Manabati*, A.I.R. 1935 Pat. 194: 156 I.C. 407.

S. 52
applicable
to *mokurari*
tenant.

Abatement
for diluvion.

Sec. 52 of the B. T. Act is applicable even to a tenant holding under a *mokarari* lease. A tenant would be thus entitled to claim abatement of rent under the section if it can be ascertained that he has lost the whole or portion of the land by diluvion or some similar cause. *Dukhalal Chaudhury v. Mst. Manabati*, 15 Pat. 594: A.I.R. 1936 Pat. 341: 163 I.C. 1003.

Lotdar
holding
land in
Sunderbans
if proprie-
tor or
tenure-
holder
under the
Govt.

A *lotdar*, who holds land in the Sunderbans under a grant made by the Government under the Waste Land Rules of 1853 on terms that the *lotdar* was to pay a revenue fixed on the basis of area for 99 years and thereafter was to be entitled to a re-settlement—under conditions applicable to owner of temporarily-settled estates, is a proprietor of such land and not a tenure-holder under the Government. Such a *lotdar* is not entitled, if a part of the land is lost by diluvion, to a reduction under sec. 52 (1) (b) of the Bengal Tenancy Act, 1885, of the amount payable to the Government: *Ambuj Bashini Chaudhurani v. Secretary of State for India*, I.L.R. [1938] 2 Cal. 1.

4. Sub-secs. (3) and (4): The sub-sec. which sets forth the rule to guide Courts in determining the amount of additional rent is sub-sec. (3) and not sub-sec. (4). The rule contained in sub-sec. (4) does not apply to a case of assessment of rent on additional area: *Abdul Gani Chaudhuri v. Angri Bhiku*, 56 Cal. 919: A.I.R. 1930 Cal. 205.

5. Sub-sec. (4):—The principle laid down in sec. 52 (4) for reduction of rent on decrease in area of holding held at a consolidated or lump rent, the components of which cannot be distinguished by reference to the fields constituting the holding, may be applied in calculating the amount of reduction to be allowed for permanent deterioration under sec. 38 (1) (a) provided always that any difference in circumstances is not lost sight of. The analogy, however, only operates completely when the permanent deterioration is substantially equivalent to loss of the area: *Srikant Rai v. Sheolagan Ahir*, A.I.R. 1934 Pat. 473.

6. Land within defined boundaries :—The applicability of sec. 52 must depend upon the nature of the contract between the parties to the case. If the lessor intended by the contract to let and the lessee intended to take the tenure within the specified boundaries, be the number of *bighas* in it what they may, the fact that the area proves to be larger than what was stated originally by estimate would not entitle the lessor to additional rent and sec. 52 will not apply: *Shailendra Nath Mitra v. Girijabhushan Mukherji*, 58 Cal. 686: A.I.R. 1931 Cal. 596: 133 I.C. 696.

Tenure within specified boundaries: Intention of parties.

Where the rent fixed is a consolidated rent for lands within certain boundaries the landlord is not entitled to get an additional rent for an additional area. In such a case the area mentioned in the document must be held to be a false description: *Manohar Baidya v. Rhabasindhu Mandal*, 58 C.L.J. 83: A.I.R. 1934 Cal. 121: 150 I.C. 90.

Consolidated rent.

7. Assessment of rent upon Contract :—Sec. 52 contemplates that there must be an addition of land to the original tenancy. But if in the *kabuliyat* a certain area is mentioned and a certain rent is also mentioned as the rent for the area and there is a stipulation that if at any time the lands are measured with a certain standard measurement and it is found on such measurement that there is any quantity of land either more or less than the area stated, the tenants will have to pay additional rent or will get abatement of rent as the case may be, sec. 52 will not be applicable, but the landlord would be entitled to get additional rent on the basis of the contract: *Mangal Namadas v. Kali Sundar Bhadra*, A.I.R. 1933 Cal. 525: 144 I.C. 85.

8. Claim for additional rent upon contract and Sec. 52 :—Where the claim for additional rent for additional area is based not only on the terms of a *kabuliyat*, but upon the provisions of sec. 52, held, that the claim under sec. 52 being a recurring right is not barred because the landlord omitted to make the measurement, which was provided for in the *kabuliyat*: *Kedar Nath Bose v. Emandi Mandal*, 42 C.W.N. 994. The case of *Kalidas Dutta v. Harendra Nath Mukherji*, 53 C.L.J. 526 was distinguished.

9. Encroachment :—As to effect of encroachment by tenant on the lands of third person, see notes under heading No. 5 at p. 23.

10. Standard of Measurement: Presumption :—In a suit for additional rent on the ground of excess area the presumption is that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved: *Sasanka Kumar Nayak v. Hital Sow*, 60 Cal. 434: 37 C.W.N. 450.

A landlord suing for additional rent in respect of excess area is entitled to the benefit of the presumption that the standard of measurement at the date of the final publication of the record-of-rights was also the standard at the inception of the tenancy: *Gopi Krishna Saha v. Surendra Nath Choudhury*, 60 C.L.J. 288: A.I.R. 1935 Cal. 210: 155 I.C. 154. See also the *Bhowanipore Zemindary Company Ltd. v. Ram Mondal*, 67 C.L.J. 1, where it was held that unless there is evidence to show that there was a different standard the official standard should be presumed to have been acted upon. See also *Kedar Nath Bose v. Emandi Mandal*, 42 C.W.N. 994.

Onus on tenant to prove extent of diluvion.

II. Burden of proof :—In a suit for rent if the tenant pleads that he is not liable to pay the full agreed rent on account of diluvion and even when there is admission by the landlord or it is proved that some diluvion has taken place, the onus is upon the tenant to prove the extent of the diluvion and the corresponding abatement which he may claim: *Kumar Arun Chandra Singha v. Bagaban Chandra Roy*, 59 Cal. 155 (F.B.): 35 C.W.N. 1011: 54 C.L.J. 31: A.I.R. 1931 Cal. 537: 133 I.C. 577.

Onus on landlord to prove tenant holding excess land.

The burden of proving that the defendant is holding excess land for which he is liable to pay an additional rent is in the first instance on the landlord: *Gopi Krishna Saha v. Surendra Nath Choudhury*, 60 C.L.J. 288: A.I.R. 1935 Cal. 210: 155 I.C. 154.

Where a suit is instituted under the B. T. Act by a landlord for settlement of fair rent for certain lands on the ground of accretion to the tenure of the tenant and the tenant contended that at the time the B. T. Act was enacted, the predecessors of the landlord had no right to additional rent, the burden of proof of establishing the plea taken by the tenant rests on him: *Khaje Habibulla v. Bepin Chandra*, A.I.R. 1936 Cal. 454.

12. Dispossession of tenant :—A landlord is bound to put his tenant in possession. If he fails to put his tenant in possession of the whole of the demised premises he can only get rent for so much of the land of which he had put the tenant in possession. The landlord's duty does not extend to protect the tenant from unlawful eviction by persons who have not got any title or who have not derived any title from the landlord. It is for the tenant to recover possession from the dispossessioner and he cannot claim abatement of rent: *Surendra Nath Mondal v. Bhudar Chandra Safui*, 67 C.L.J. 136. See notes under sec. 3 cl. (6).

Sub-Sec. (6) is retrospective.

13. Sub-sec. (6) :—This sub-sec. as amended in 1928, merely enacts a rule of evidence, i.e., a rule of procedure. It is retrospective and applies to all actions, pending and future: *The Port Canning and Land Improvement Co., Ltd. v. Saroda Prosad Dalal*, 39 C.W.N. 668: 62 C.L.J. 251. Under the old sub-sec. (6) the landlord had to prove the practice of settling lands on measurement at the time when the area in excess is found out before the institution of the suit, and on such proof he got the 'presumption' that the area had been entered on measurement in his rent-roll. Under the amended sub-sec. (6) the landlord has to prove the said practice prevalent at the time when the rent-roll containing the areas of the holding was prepared, and on proof thereof, he gets the presumption further back to the date of the creation of the tenancy. In other words, the Court has to presume that the tenancy has been created after measurement: *Ibid.*

14. Holding :—A "holding" under the old law could not be composed of an undivided share of land and sec. 52 of the B. T. Act did not apply to a tenancy composed of some definite plots and an undivided share in another plot. The word "area" in that section indicates a definite quantity of land: *Benode Kumar Roy Choudhury v. Ganga Charan Mestagiri*, 35 C.W.N. 219: 51 C.L.J. 485. See new definition of "holding".

15. Back rent :—The B. T. Act makes a distinction between enhancement of rent and alteration of rent on alteration of area. The right to recover additional rent for excess area is a recurring one and a landlord is entitled to exercise it whenever he finds it necessary to do so. There is nothing to prevent him from claiming back rent for any additional area in the use and occupation of the tenant, subject to the law of limitation, though in a proceeding for enhancement he cannot claim back rent. A decree obtained by a landlord under such a decree does not preclude the landlord from claiming enhancement under sec. 30 (b) of the Act: *Satish Chandra Chakravarty v. Abdul Huque Sardar*, 40 C.W.N. 79: 62 C.L.J. 136: A.I.R. 1936 Cal. 180. Back rent can be claimed under Sec. 52 but not under Sec. 30.

16. 10 p. c. Deduction :—When a suit is instituted for additional rent on the ground of excess area under sec. 52 the Court would be acting rightly in reducing the settlement area by ten per cent before comparing it with the previous area as found on private measurement: *Jaynuddin v. Ramesh Chandra Ray*, 40 C.W.N. 1022.

17. Miscellaneous :—If the area mentioned in the landlord's papers was not based on measurement and if the tenant never agreed that he would be liable to pay additional rent for the same land as the result of any future measurement, the landlord could not succeed in his claim for additional rent for excess land as made in the suit on the basis of area recorded in the Record-of-Rights and that a certain rate was fixed as a result of compromise: *Raja Jagat Kishore Acharja Chowdhury v. Kamaruddin*, 60 Cal. 138: 56 C.L.J. 279.

Co-sharer, on partition allotted increased share in some items of joint property in lieu of original share in all—previous lease of undivided share in all items transferred to items so allotted—Rent payable, if contract rent or sum ascertained by rule of three: *Ahmmad Mohammad Paruk v. Rahimannessa Khatun*, 35 C.W.N. 1260.

Where a reclamation lease recited that the tenant possessed the land originally rent-free, that the rent was to be progressive, and finally from a particular year at the full rate and the tenant agreed not to raise any objection as to payment of rent on any ground, that the tenancy would be liable to enhancement or abatement of rent according to the measurement of the land from time to time, that in case the Government revenue was raised, the tenant would pay it and that the tenant would be bound by all the provisions of the law relating to rent which is in force or will in future be enforced, held, the *kabuliyat* created a *mokarari* tenancy and the rent was not liable to be increased except in the two cases specified by the deed: *Satya Charan Law v. Rai Mohon Sil Das*, 36 C.W.N. 183. See notes under sec. 7 heading No. 1 at p. 48.

Payment of rent.

53. Subject to agreement or established usage, a money-rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year.

Payment of rent.
Instalments of rent.

Notes :—Apart from sec. 36 of the Transfer of Property Act rent does not accrue from day to day: *Maharaja Kumar Ram Ranbijiya Prasad Singh v. Rai Bahadur Harihar Prasad Singh*, 16 Pat. 184.

Time and
place for
payment
of rent.

54. (1) Every tenant shall pay or tender each instalment of rent before sunset of the day on which it falls due :

Provided that the tenant may pay or tender the rent payable for the year at any time during the year before it falls due.

(2) The payment or tender of rent may be made—

(i) at the landlord's village-office or at such other convenient place as may be appointed in that behalf by the landlord; or

(ii) by postal money-order in the manner prescribed by rules made by the Local Government.

A tender may also be made by depositing the rent in Court in accordance with the provisions of section 61.

(3) Where rent is sent by postal money-order in the manner prescribed, the Court may presume until the contrary is proved that a tender has been made.

(4) When a landlord accepts rent sent by postal money-order, the fact of this acceptance shall not be used in any way as evidence that he has admitted as correct any of the particulars set forth in the postal money-order form.

(5) Any instalment or part of an instalment of rent not duly paid at or before the time when it falls due shall be deemed to be an arrear.

Amendment :—The words "or that he has waived his rights under secs. 26D, 26E, 26F or 26J" at the end of sub-sec. (4) were omitted by the B. T. (Amendment) Act VI of 1938, sec. 18.

Appropriation of
payments.

55. (1) When a tenant makes a payment on account of rent, he may declare the year or the years and instalment to which he wishes the payment to be credited, and the payment shall be credited accordingly.

(2) If he does not make any such declaration, the payment may be credited to the account of such year and the instalment as the landlord thinks fit.

Notes :—A rent suit was brought by a landlord against his tenant in respect of arrears of certain years and damages thereon.

The tenant pleaded payment of a certain amount about a year before the suit. The landlord had appropriated the amount towards the arrears of rent of the year preceding those in the suit and damages thereon. The tenant contended that the landlord was not entitled to appropriate anything towards damages. There was no proof that the tenant while making the payment had made any declaration as to the years towards the arrears of which the amount was to be appropriated, *held*, that the landlord was entitled to credit the payment as done by him: *Md. Yusuf v. Mt. Ramdan Kuer*, A.I.R. 1935 Pat. 524: 160 I.C. 925.

Receipts and accounts.

Receipts and accounts.

56. (1) Every tenant who makes a payment on account of rent to his landlord shall be entitled to obtain forthwith from the landlord a written receipt for the amount paid by him, signed by the landlord.

Tenant making payment to his landlord entitled to a receipt.

(2) The landlord shall prepare and retain a counterfoil of the receipt.

(3) The receipt and counterfoil shall specify such of the several particulars shown in Schedule II to this Act as can be specified by the landlord at the time of payment:

Provided that the Local Government may, from time to time, prescribe or sanction a modified form, either generally or for any particular local area or class of cases.

(4) If a receipt does not contain substantially the particulars required by this section, it shall be presumed, until the contrary is shown, to be an acquittance in full of all demands for rent up to the date on which the receipt was given.

57. (1) Where a landlord admits that all rent payable by a tenant to the end of the agricultural year has been paid, the tenant shall be entitled to receive from the landlord, free of charge, within three months after the end of the year, a receipt in full discharge of all rent falling due to the end of the year, signed by the landlord.

Tenant entitled to full discharge or statement of account at close of year.

(2) Where the landlord does not so admit, the tenant shall be entitled, on paying a fee of four annas, to receive, within three months after the end of the year, a statement of account specifying the several particulars shown in Schedule II to this Act, or in such other form as may from time to time be prescribed by the Local Government either generally or for any particular local area or class of cases.

(3) The landlord shall prepare and retain a copy of the statement containing similar particulars.

Penalties and fine for withholding receipts and statements of account and failing to keep counter-parts.

58. (1) If a landlord without reasonable cause refuses or neglects to deliver to a tenant a receipt containing the particulars required by section 56 for any rent paid by the tenant, the tenant may, within three months from the date of payment, institute a suit to recover from him such penalty, not exceeding double the amount of value of that rent, as the Court thinks fit.

(2) If a landlord without reasonable cause refuses or neglects to deliver to a tenant demanding the same either the receipt in full discharge or, if the tenant is not entitled to such a receipt, the statement of account for any year required in section 57, the tenant may, within the next ensuing agricultural year, institute a suit to recover from him such penalty as the Court thinks fit, not exceeding double the aggregate amount or value of all rent paid by the tenant to the landlord during the year for which the receipt or account should have been delivered.

(3) If a landlord or his agent, without reasonable cause, fails to deliver to the tenant a receipt or statement or to prepare and retain a counterfoil or copy of a receipt or statement, as required by either of the said sections, such landlord or agent, as the case may be, shall be liable to a fine not exceeding fifty rupees, to be imposed, after summary inquiry, by the Collector.

(4) The Collector may hold a summary inquiry under sub-section (3), either on information received from a Revenue-officer within one year, or upon complaint of the party aggrieved made within three months, from the date of failure, or upon the report of a Civil Court.

(5) Where, in any case instituted under sub-section (3), the Collector discharges any landlord or agent, and is satisfied that the complaint of the tenant on which the proceedings were instituted is false or vexatious, the Collector may, in his discretion, by his order of discharge, direct the tenant to pay to such landlord or agent such compensation, not exceeding fifty rupees, as the Collector thinks fit.

(6) An appeal shall lie to the Commissioner of the Division against any order of the Collector imposing a fine under sub-section (3) or awarding compensation

under sub-section (5); and the order passed by the Commissioner on such appeal shall, subject to any order which may be passed on revision by the Board of Revenue be final.

(7) Any fine imposed or compensation awarded under this section may be recovered in the manner provided by any law for the time being in force for the recovery of a public demand.

(8) For the purpose of an inquiry under this section the Collector shall have power to summon, and enforce the attendance of witnesses, and compel the production of documents in the same manner as is provided in the case of a Court under the Code of Civil Procedure, 1908. Act V of 1908.

(9) The existence of a dispute as to the rent or area of a tenancy on account of which rent is paid shall not be deemed to be a reasonable cause for refusing, neglecting or otherwise failing to deliver—

(a) a receipt for any amount actually paid on account of rent, or

(b) the statement of account required by section 57,

and the refusal of the tenant to accept the receipt shall not be deemed to be a reasonable cause for failing to prepare and retain a counterfoil of such receipt as required by section 56.

59. (1) The Local Government shall cause to be prepared and kept for sale to landlords at all sub-divisional offices forms of receipts with counterfoils and of statements of account suitable for use under sections 56 to 58. Local Government to prepare forms of receipt and account.

(2) The forms may be sold in books with the leaves consecutively numbered or otherwise as the Local Government thinks fit.

60. Where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorized in that behalf, shall be a sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. Effect of receipt by registered proprietor, manager or mortgagee.

But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee.

1. Object of the Section :—Sec. 60 has been enacted to avoid as far as it is practicable the conversion of a simple rent suit into a complicated title suit: *Mahomed Waliur Rahman v. Mt. Sitakur*, A.I.R. 1934 Pat. 123: 148 I.C. 967: A person registered as proprietor under the Bengal Land Registration Act, 1876, is entitled to recover rent from the tenant without any further proof of his title: *Ibid.*

2. Estate :—A tenure of land which is not revenue-free or revenue paying and which although Government property has not been directed by the Board to be entered separately in the General Register does not come under sec. 78 of the Land Registration Act as an estate. Consequently the disability imposed upon tenants by sec. 60 of the B. T. Act precluding them from setting up the right of any person other than whose names are registered under the Land Registration Act does not apply to the tenants under such a tenure: *Ruhini Kumar Das v. Aminuddin Kabiraj*, 35 C.W.N. 648.

3. Objection not raised in written statement :—Where objection under sec. 60 as to the registration of the landlord's name is not raised in the written statement, the Court is not bound to consider it although a question might have been put to the landlord or his witness as to whether his name was registered: *Isab v. Gour Charan Saha*, 49 C.L.J. 372, A.I.R. 1929 Cal. 431.

4. Third person :—Where the plaintiffs sued both the tenant-defendants and the *pro forma* proprietor-defendants and claimed a remedy against the *pro forma* proprietor-defendants that in case the tenant had paid rent to them they should disgorge a proper proportion of it, *held*, that it was open to the *pro forma* proprietor-defendants to defend the claim made by the plaintiffs against them by showing that the plaintiffs had no right to recover that rent. To such a case sec. 60 has no application: *Tulsi Ahir v. Ram Das Sahu*, 13 Pat. 237: A.I.R. 1934 Pat. 117: 147 I.C. 1035.

*Deposit of
of rent.*

Application
to deposit
rent in
Court.

Deposit of rent.

61. (1) In any of the following cases, namely :—

- (a) when a tenant tenders money on account of rent and the landlord refuses to receive it or refuses to grant a receipt for it;
- (b) when a tenant bound to pay money on account of rent has reason to believe, owing to a tender having been refused or a receipt withheld on a previous occasion, that the person to whom his rent is payable will not be willing to receive it and to grant him a receipt for it;

(c) when the rent is payable to co-sharers jointly, and the tenant is unable to obtain the joint receipt of the co-sharers for the money and no person has been empowered to receive the rent on their behalf; or

(d) when the tenant entertains a *bona fide* doubt as to who is entitled to receive the rent,

the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding an application in writing for permission to deposit in the Court a sum not less than the amount of the money then due.

(2) The application shall contain a statement of the grounds on which it is made; shall state —

in cases (a) and (b), the name of the person to whose credit the deposit is to be entered and the name of his common agent, if any,

in case (c), the names of the sharers to whom the rent is due, or of so many of them as the tenant may be able to specify, and

in case (d), the names of the person to whom the rent was last paid and of the person or persons now claiming it;

shall be signed and verified, in the manner provided in sub-rules (2) and (3) of rule 15 of Order VI in Schedule I to the Code of Civil Procedure, 1908, by the tenant, or, where he is not personally cognizant of the facts of the case by some person so cognizant; and shall in cases (a) and (b) be accompanied by the prescribed cost of transmission of the money deposited to the landlord and in cases (c) and (d) by a fee of the prescribed amount.

Act V of 1908.

62. (1) If it appears to the Court to which an application is made under sec. 61 that the applicant is entitled under that section to deposit the rent, it shall receive the rent and give a receipt for it under the seal of the Court.

Receipt granted by Court for rent deposited to be a valid acquittance.

(2) A receipt given under this section shall operate as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid, in the same manner and to the same extent as if that amount of rent had been received—

in cases (a) and (b) of section 61 by the person specified in the application as the person

to whose credit the deposit was to be entered;

in case (c) of that section, by the co-sharers to whom the rent is due; and

in case (d) of that section, by the person entitled to the rent.

Procedure
for payment
to the land-
lord of rent
deposited.

63. The Court receiving a deposit—

(i) in case (a) or (b) of section 61 shall forthwith forward the same by postal money order to the address of the landlord, or of the common agent, if any, of the landlord empowered to receive rent;

(ii) in case (c) or (d) of that section shall forthwith cause to be affixed in a conspicuous place at the Court-house a notification of the receipt thereof containing a statement of all material particulars, and, if the amount of the deposit is not paid away under section 64 within the period of fifteen days next following the date on which the notification is so affixed, the Court shall forthwith in case (c) cause a notice of the receipt of the deposit to be posted free of charge at the landlord's village-office, if any, and in some conspicuous place in the village in which the tenure or holding or any portion thereof is situated, and in case (d) cause a like notice to be served free of charge on every person who it has reason to believe claims, or is entitled to, the deposit.

Payment or
refund of
deposit.

64. (1) The Court may pay the amount of the deposit notified under section 63 to any person appearing to it to be entitled to the same, or may, if it thinks fit, retain the amount pending the decision of a Civil Court as to the person so entitled.

(2) If no payment is made under clause (i) of sec. 63 or under sub-sec. (1) of sec. 64 before the expiration of three years from the date on which a deposit is made, the amount deposited may, in the absence of any order of a Civil Court to the contrary, be repaid to the depositor upon his application and on his returning the receipt given by the Court with which the rent was deposited.

(3) No suit or other proceeding shall be instituted against *the Secretary of State for India in Council*, or against any officer of the Government, in respect of anything done by a Court receiving a deposit under sec. 62 but nothing in this section shall prevent any person entitled to receive the amount of any such deposit from recovering the same from a person to whom it has been paid under this section.

[**Note**:—For the words "*the Secretary of State for India in Council*" and "*the Government*" in sub-sec. (3) the words "*the Crown*" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.]

Sub-sec (3) :—When the tenant has deposited rent under sec. 61 and has obtained acquittance from the Court in respect of the rent as provided by the statute he ceases to have any right in the money which is then held by the Court on behalf of the landlord. And the period of limitation provided in sub-sec. (3) is not for the purpose of barring the landlord's claim to withdraw the money, but for the purpose of preventing the tenant from withdrawing the money before the expiration of the period stated in the statute. Hence a tenant who has deposited the rent cannot object to the landlord's claim to withdraw the amount even after the expiry of three years from the date of deposit: *Mt. Janki Dai v. Dwarka Nath Singh*, A.I.R. 1933 Pat. 219: 145 I.C. 132.

Penalty for refusing to receive rent.

64A. It a landlord or his agent refuses without reasonable cause to receive payment of rent remitted by postal money order or deposited in Court, the landlord shall be precluded from recovering by suit interest, costs or damages in respect of the same, and the Court may in addition award to the tenant damages not exceeding twenty-five *per cent* on the whole amount claimed by the plaintiff.

Penalty for refusing to receive rent.

Penalty for refusing to receive rent tendered by postal money order or deposited.

The plea of the existence of any dispute as to the amount of rent or area of land of the tenure or holding shall not be deemed to be a reasonable cause under this section :

Provided that, when a landlord accepts rent, which has been deposited or remitted by postal money order, the fact of his acceptance shall not be used in any way as evidence that he has admitted as correct any of the particulars set forth in the application for permission to deposit or in the postal money order form.

Arrears of rent.

Liability to sale for arrears in case of permanent tenure, holding at fixed rates or occupancy-holding.

Arrears of rent

65. Where a tenant is a permanent tenure-holder, a *raiyat* holding at fixed rates or an occupancy-*raiyat*, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.

Headings of Notes

1. RENT, WHEN FIRST CHARGE.
2. SCOPE OF RENT SUIT.
3. PARTIES.
4. RENT DUE AT THE TIME OF SALE.
5. EXECUTION OF RENT DECREE.
6. SUIT FOR REFUND BY AUCTION PURCHASER.
7. RESJUDICATA.
8. HAJABAD.
9. MISCELLANEOUS.

A person seeking to have a rent sale must have the landlord's interest from the institution of the suit till the date of sale.

I. Rent, when first Charge :—The right to bring the tenure or holding to sale under sec. 65 exists only so long as the relationship of landlord and tenant exists, and so a person seeking to have the tenure or holding sold at a rent sale must have the landlord's interest vested in him from the date of the institution of the suit till the date of the sale. The sale of a tenure or holding is possible so long as the rent is a first charge thereon. But the rent remains a first charge only so long as the relationship of landlord and tenant subsists: in other words the charge is an incident of that relationship. Where the landlord after obtaining a decree for arrears of rent parted with his interest and then applied for execution of the decree, held, that the sale did not pass the holding: *Krishnapada Chatterjee v. Manada Sundari Ghose*, 59 Cal. 1202 (*Special Bench*): 36 C.W.N. 518: 55 C.L.J. 240: A.I.R. 1932 Cal. 321.

Where after the institution of a rent suit but before the decree, the tenant transfers the holding and the transferee is not added as a party to the rent suit, the decree is not a rent decree. In proceedings against the holding in execution of such a decree the transferee is entitled to prefer a claim under Or. 21, r. 58, C. P. C. The landlord may possibly preserve his security of the holding by impleading the transferee in the execution proceeding; *Maharaja Bahadur Singh v. Nari Mollani*, 63 Cal. 1117: 40 C.W.N. 683.

It is only arrears of rent that are charged by sec. 65 of the B. T. Act upon the tenure and it is only such arrears that can be realised in execution by the sale of the tenure. Chapter XIV of the Act does not purport to enlarge or restrict the exercise of this right but only provides the machinery for working it out. Where a decree was for arrears of rent which included interest which was not due and could not be recovered as rent, held, that such a decree was not a proper rent decree which could be executed by a sale under Chapter XIV of the B. T. Act: *Jitendra Nath Ghose v. Monomohon Ghose*, 57 I.A. 214: 34 C.W.N. 821: 52 C.L.J. 272 (P.C.).

The right given by sec. 65 is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law sought to be enforced. Similarly, a decree obtained by a landlord against the tenants who had ceased to be tenant cannot be called to be a decree for rent: *Midnapore Zemindari Co., Ltd. v. Mrinal Kanti Roy*, 42 C.W.N. 967: A.I.R. 1938 Cal. 681.

Decree against tenant who had ceased to be tenant is not rent decree.

A second rent-decree obtained by the landlord after confirmation of the sale of the tenure or holding in execution of a rent-decree for a previous period is not a decree under Chapter VIII of the Bengal Tenancy Act even when the second rent-suit was instituted before the sale and consequently such a decree does not constitute a first charge on the holding or the sale proceeds thereof under sec. 65 of the Bengal Tenancy Act: *The Official Trustee of Bengal v. Purna Chandra Roy*, 34 C.W.N. 702. The charge created by sec. 65 does not attach as soon as rent falls into arrears or a rent suit is brought. It attaches only when the time for enforcing a decree has come and the decree is one obtained by the landlord under Chapter VIII, i.e., a decree obtained during the continuance of the relationship of landlord and tenant between the parties: *Ibid.*

Second rent decree, if constitutes first charge.

The charge which the landlord obtains is not on the same footing as that of a mortgagee: *Ramnandan Prasad Singh v. Ram Das*, A.I.R. 1934 Pat. 70: 155 I.C. 663.

2. Scope of Rent Suit:—A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be passed under sec. 65 of the Act. A money decree can be given in a case where owing to the existence of a dispute regarding the real area of the tenancy the landlord has omitted to mention certain plots which form part of the tenant's holding: *Jeonandan Singh v. Janki Singh*, 17 Pat. 451 (F.B.). See also *Midnapur Zemindari Co., Ltd. v. Mrinal Kanti Roy*, 42 C.W.N. 967: A.I.R. 1938 Cal. 681.

Rent suit is for enforcing charge and also personal liability.

3. Parties.—Although it is not the duty of the landlord to find out who all the heirs of a deceased tenure-holder are, still if it actually comes to the knowledge of the landlord who they are—even though not notified in the manner laid down in the B. T. Act—the landlord cannot ignore such persons when suing for rent and any decree obtained in a suit brought not against the real heirs but some other person who might have succeeded to the tenancy will not have the effect of a rent decree within the meaning of Chapter XIV of the Bengal Tenancy Act: *Ali Baksha Bepari v. Chitta Ranjan Guha*, 42 C.W.N. 334.

In order to justify a sale of a tenure at a rent sale all parties interested in the tenure must be joined as defendants in the rent suit or be sufficiently represented by parties joined as defendants: *Jagadishwar Dayal Singh v. Pathak Dwarka Singh*, 60 I.A. 176. (This was a case under sec. 208 of the Choto Nagpur Tenancy Act. It was held that cases decided on the construction of sec. 159 of the B. T. Act as regards this point, are equally applicable to the construction of sec. 208 of the Choto Nagpur Tenancy Act).

In order to get a rent decree it is not enough for the landlord to implead the recorded tenants of the tenure only if, in fact, the interest of any of them passed to a third person, unless there are circumstances to show that the tenants impleaded represented the whole estate: *Ramesh Chandra Guha v. Dinanath Mistry*, 62 C.L.J. 483. See *secs. 146A and 146B*.

Where a suit for rent is brought against two tenants and one of them dies before a decree is passed, the decree is not executable against the surviving tenant as a rent decree but it can be executed as a money decree: *Ramanand Singh v. Damodar Prasad*, A.I.R. 1933 Pat. 195: 143 I.C. 64.

Where a decree is obtained not against the proper person who represents the estate and the estate is sought to be sold in execution of such a decree, the case falls within the principle of *Khiairajmal v. Daim*, 32 Cal. 296 and the decree is liable to be set aside in revision for want of jurisdiction: *Ananga Mohon Roy Choudhury v. Nawab Khaje Habibulla*, 53 C.L.J. 415: A.I.R. 1931 Cal. 673: 134 I.C. 305.

4. Rent due at the time of sale:—An auction-purchaser under a rent decree who purchases a holding with notice that the holding was liable to payment of arrears of rent which had accrued since the date of suit and anterior to the sale, is liable for the rent of that period: *Kamaldhari Lal v. Tarachand Marwari*, A.I.R. 1935 Pat. 118: 159 I.C. 169.

Landlord himself purchasing tenure at money sale, if may recover arrears of rent for period prior to sale.

After the landlord has himself purchased a tenure at a money sale in execution of a decree for the rent of another tenure he is not entitled to recover from the tenure-holder the rent for a period anterior to the decree, although the arrears may not have been notified in the sale proclamation. He cannot obtain even a money decree: *Midnapore Zemindari Co., Ltd. v. Mrinal Kanti Roy*, 42 C.W.N. 967.

5. Execution of Rent decree:—It is not obligatory upon the landlord to execute a rent decree against the rent paying property and not against other properties belonging to the judgment-debtor. He may, if he thinks fit, proceed to execute the decree against other properties owned by the judgment-debtor; but if he does so he will not have the advantage of the provisions of the B. T. Act with regard to rent decrees and would be thrown back into the position of having a money decree in execution of which he can sell the property of the joint family in case the judgment-debtor happens to be a member of joint Hindu family only in those circumstances under which a joint family property would be liable: *Mukhram Mahlo v. Kesho Prasad Singh Bahadur*, A.I.R. 1936 Pat. 258: 162 I.C. 879.

6. Suit for refund by auction purchaser:—A purchaser of a tenure at a sale in execution of a rent decree came to know in course of his proceedings to take possession of that tenure that the decree-holder landlord had, prior to allowing his previous execution case of the same rent decree to be struck off, acknowledged in proceedings under sec. 105 of the B. T. Act a transferee of the original tenure-holder as his tenant, but that the decree-holder landlord did not join that transferee as party in that execution case before it was struck off. Thereafter the purchaser filed a suit

against the decree-holder landlord for refund of the purchase price and of the money paid by him as rent, *held*, that the suit was maintainable: *Chaitanya Das Banerji v. Ranjit Pal Chaudhuri*, I.L.R. [1938] 1 Cal. 512.

7. Resjudicata.—A decree in a previous suit for rent against the plaintiff on the specific allegation that the property in the suit formed a part of the tenancy by the plaintiff and unless such a decree is set aside on the ground of fraud a subsequent suit for declaration that the property in suit does not form part of the tenancy is not maintainable: *Sagareswar Chatteraj v. Babulal Chattopadhyaya*, 68 C.L.J. 75.

8. Hajabad.—A custom of “Hajabad” to the effect that the tenant is not liable to pay rent to his landlord for the years when there has been inundation is not an encumbrance which can be disregarded by the landlord who is a recent purchaser at a revenue sale: *Nolin Behari Bosu v. Haripada Bhuia*, 38 C.W.N. 139.

9. Miscellaneous.—The decree for enhancement is separable from the decree for rent. Merely because the two claims are joined in one suit, it does not necessarily follow that if the decree for enhancement cannot be enforced, the decree for rent also cannot be enforced: *Ramanand Singh v. Damodar Prasad*, A.I.R. 1933 Pat. 195: 143 I.C. 64.

The bare institution of a suit for ejectment of the tenant is not an interference with his actual possession, which may still be quietly enjoyed. Rent does not stop during the period of the suit for ejectment. The tenant is therefore liable for rent for the period of the suit: *Ram Racheva Singh v. Kamakhya Narain Singh*, A.I.R. 1935 Pat. 415: 158 I.C. 1134.

Where it appeared that a plot was within a *touzi* which was included in the estate which was partitioned, the question whether that plot appertained to *kheraj* mahal or *lakheraj* mahal was to be decided by the partition Commissioner and it would be wrong to allow such question to be raised by way of defence in a rent suit after it had been allotted to the plaintiff's share: *Kokaram Bairagi v. Kumar Bimalendu Roy*, 66 C.L.J. 578.

Where certain land is sold by a person but the property continues to be in possession of the family as before, and the wife of the vendor is to pay rent to the purchaser, in a suit for rent by such purchaser, the wife cannot plead that she has not been put in possession. No such question arises as the wife has got such possession of the demised land as it was capable of being made over to her: *Sabarattulla Sheikh v. Manikjan Bibi*, A.I.R. 1936 Cal. 323.

Plea that a plot does not appertain to *kheraj*, if can be raised by way of defence in rent suit.

66. (1) When an arrear of rent remains due from a tenant not being a permanent tenure-holder, a *raiyyat* holding at fixed rates or an occupancy-*raiyyat*, at the end of the agricultural year the landlord may, whether he has obtained a decree for the recovery of the arrear or not and whether he is entitled by the terms of any contract to eject the tenant for arrears or not, institute a suit to eject the tenant.

Ejectment for arrears in other cases.

(2) In a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon, and the decree shall not be executed if that amount and the costs of the suit are paid into Court within thirty days from the date of the decree, or when the Court is closed on the thirtieth day on the day upon which the Court reopens.

(3) The Court may for special reasons extend the period of thirty days mentioned in this section.

1. Sub-sec (2) :—The mortgagee of a non-transferable under-riyati holding has no *locus standi* to deposit money under this sub-section in order to stay execution of a decree for ejectment on the ground of non-payment of arrears of rent: *Mohini Mohan Saha v. Benod Behari Saha*, 60 Cal. 1313: 37 C.W.N. 1920: 58 C.L.J. 281.

2. Sub-sec (3) :—When a decree is drawn up directing the judgment-debtor to pay the decretal amount within a specified time, the extension of time would not be an order under sec. 66 (3), B. T. Act. It is an order varying the terms of the decree which the Court has no jurisdiction to vary. Where the Court varies the terms of a decree by extending time which he has no jurisdiction to do, there is no appeal from that order but it can only be set right by an application for revision: *Daliluddi v. Bakshi Bepari*, A.I.R. 1929 Cal. 140: 112 I.C. 124.

3. Under-riyat with right of occupancy :—Sec. 66 does not in its terms profess to be inapplicable to under-riyats having right of occupancy: *Abdul Hamid v. Fakub Ali Pandit*, 33 C.W.N. 1193: 54 C.L.J. 68. Sec. 65 has been made applicable to under-riyats with right of occupancy, see sec. 48G sub-sec. (2) (ii).

Interest on
arrears.

67. An arrear of rent shall bear simple interest at the rate of *six and a quarter per centum per annum* from the expiration of that quarter of the agricultural year in which the instalment falls due to the date of payment or of the institution of the suit, whichever date is earlier.

Headings of Notes.

1. AMENDMENT.
2. SEC. 67 AND SECS. 178 AND 179: RETROSPECTIVITY.
3. INTEREST ON CESS.
4. INTEREST ON ARREARS OF PUTNI RENT.
5. INTEREST ON RENT, IF RENT: SUIT FOR INTEREST ONLY IF MAINTAINABLE AS RENT SUIT.
6. RENT IN KIND.
7. IF INTEREST CAN BE AWARDED WHEN NOT CLAIMED: RENT UNDERMINED, IF INTEREST PAYABLE.

1. Amendment :—The words in *italics* “*six and a quarter*” have been substituted for the words “*twelve and-a-half*” by the B. T. (Amendment) Act VI of 1938, sec. 19. The amendment was opposed on the ground that “so long as the several Acts which provide for payment by the landlord to Government of interest at the rate of 12½ p.c. continue, the rate that the landlord will be entitled to charge from his tenants should be the same”.

Act VI
of 1938 :
Amend-
ment.

[**Note :—**See *The Bengal Rates of Interest Bill, 1938, with Statement of Objects and Reasons, published in the Calcutta Gazette, dated the 17th March, 1938, Part IVA, pp. 20 to 22 for introduction in the Bengal Legislative Assembly for reducing the rates of interest payable on dues under the Bengal Rent Act VI of 1862, the Cess Act IX of 1880, the Bengal Public Demands Recovery Act III of 1913 and the Bengal Land Revenue (Interest) Act XVII of 1935, to 6¼ p.c. per annum. See the proposed Bill printed in the Appendix at the end of this book.*]

2. Sec. 67 and Secs. 178 and 179: Retrospectivity:—See notes under secs. 178 and 179. The provisions of secs. 178 and 179 of the B. T. Act as amended by the Amending Act of 1928 make all stipulations as to payment of interest in excess of 12½ p.c., unenforceable whether the contract was executed before or after the passing of the B. T. Act or whether it relates to a permanent *makarari* tenure or not: *Purna Chandra Saha v. Hyder Ali Patari*, 54 C.L.J. 215; A.I.R. 1932 Cal. 88; 134 I.C. 883. See also *Chandi Charan Law v. Rohini Kumar Sarkar*, 37 C.W.N. 1038; 58 C.L.J. 18; *Taraprasanna Roy v. Malaher Ali Mir*, 60 Cal. 897; 37 C.W.N. 1036; 57 C.L.J. 371. A contrary view was taken in *Chandi Charan Law v. Abbas Ali Bhuiya*, 37 C.W.N. 1170; 58 C.L.J. 93. It appears that in view of the amendment of sec. 67 by the Amending Act of 1938 read with secs. 178 and 179 of the Act any stipulation as to payment of interest in excess of 6¼ p.c. would be unenforceable whether the contract was executed before or after the passing of the Act and even if it relates to a permanent *makarari* tenure or a *putni* tenure. See new cl. (e) of sec. 195. In regard to pending cases, however, it appears that the old law as to payment of interest at the rate of 12½ p.c., would be applicable inasmuch as the rights of the parties are to be decided according to the law as it existed at the time of the institution of the suit. See notes under the heading no. 6. “Retrospectivity: Pending suit and Proceedings” at pp. 10 and 11.

Effect of
amendment
of s.s. 178
and 179 :
Retrospec-
tivity.

Amendment
of s. 67 by
Act VI of
1938, effect
of: Retros-
pectivity.

Pending
cases.

3. Interest on cess :—It appears that the provisions as to interest on cess as laid down under secs. 47 and 58 of the Cess Act and new sec. 45 inserted by the Bengal Cess (Amendment) Act XI of 1934 have not been affected by the amendment of sec. 67 of the B. T. Act.

4. Interest on arrears of Patni rent :—Interest on arrears of *Patni* rent is regulated by the terms of the engagement between the parties and not by sec. 178 or the proviso to sec. 179 of the B. T. Act: *Samser Ali Choudhury v. Munshi Mohammad Hossein Talukdar*, 41 C.W.N. 605. See also *Monoranjana Rai v. Munshi Selamuiddin Ahmed Choudhuri*, 39 C.W.N. 1003. The provisions of sec. 67 and of cl. (i) of sub-sec. (1) of sec. 178 now apply to *Patni* tenures, see new cl. (e) of sec. 195 inserted by the B. T. (Amendment) Act VI of 1938,

Interest on
Patni rent.

Amendment
of s. 195.

Suit for interest only if maintainable as rent suit.

5. Interest on rent, if rent; suit for interest only if maintainable as rent suit.—Interest payable on rent either under a contract or under the law is not rent as defined in B. T. Act and a separate suit for interest only is not maintainable as a rent suit under the B. T. Act: *Sheik Eusuf v. Jitendra Nath Roy*, 38 C.W.N. 184.

S. 67 not applicable to produce rent.

6. Rent in kind. :—Sec. 67 has no application to produce rent and it applies only to rent paid in cash: *Rameshwar Singh v. Lekh Narayan Singh*, A.I.R. 1930 Pat. 157: 120 I.C. 46.

A stipulation in the case of paddy rent payable by a certain date every year for payment of half as much again in default is one by way of penalty coming within sec. 74 of the B. T. Act and is not enforceable but reasonable compensation may be allowed: *Shyam Lal Bose v. Kalim Shaikh*, 58 Cal. 84: 34 C.W.N. 905.

7. If interest can be awarded when not claimed: Rent undetermined, if interest payable. :—Sec. 67 does not say that there is no option nor any discretion left in the Court in the matter of awarding interest though there was no claim for interest made by the plaintiff in the suit. When the rate of rent payable by the tenant is undetermined, he is not liable for interest on arrear of rent: *Jnanendra Kumar Rai Choudhury v. Debendra Kumar Rai Choudhury*, 60 Cal. 254: 57 C.L.J. 123: A.I.R. 1933 Cal. 391: 144 I.C. 823.

Power to award damages on rent withheld without reasonable cause, or to defendant improperly sued for rent.

68. (1) If, in any suit brought for the recovery of arrears of rent, it appears to the Court that the defendant has, without reasonable or probable cause, neglected or refused to pay the amount of rent due by him, the Court may award to the plaintiff, in addition to the amount decreed for rent and costs, such damages, not exceeding twenty-five *per centum* on the amount of rent decreed, as it thinks fit:

Provided that interest shall not be decreed when damages are awarded under this section:

Provided also that where damages are awarded—

- (i) the amount of such damages shall not be less than the interest accruing up to the date of the institution of the suit, and
- (ii) interest on the arrear may be awarded from the date of the institution of the suit up to the date of payment at such rate as the Court directs.

(2) If, in any suit brought for the recovery of arrears of rent, it appears to the Court that the plaintiff has instituted the suit without reasonable or probable cause, the Court may award to the defendant, by way of damages, such sum, not exceeding twenty-five *per centum* on the whole amount claimed by the plaintiff, as it thinks fit.

1. Proposed Amendment :—For the proposed amendment, see *The Bengal Tenancy (2nd Amendment) Bill, 1938 with Statement of Objects and Reasons*, published in the *Calcutta Gazette*, dated the 17th March, 1938, Part IVA, p. 23 for reducing damages from 25 % to 12½%. This Bill was passed by the Assembly on the 1st April, 1938. [See the proposed Bill printed in the Appendix at the end of this book.]

[Note : The Revenue Minister, in the course of the discussion on the amendment of sec. 67 reducing the rate of interest to 6¼ p.c. said "It was purely by inadvertence that sec. 68 was not included in the Bill. Government proposes to introduce a short amending Bill as early as possible to remove this anomaly by reducing the damages proportionately."]

2. Where both interest and damages may be awarded :—Where it was agreed between the parties to a kabuliyat that in default of the payment of money due on each *kist* interest would run at 2 per cent. per month and it was further agreed that damages at the rate of 25 per cent. over and above the interest payable by the tenant would have to be paid by the tenant in case the institution of suit for recovery of interest and rent became necessary, held, that the provisions for interest and damages were not exclusive of each other and that the court might grant both: *Chundy Churn Law v. Abbas Ali*, 37 C.W.N. 1170: 58 C.L.J. 93: A.I.R. 1934 Cal. 213: 149 I.C. 1140. See also *Chundy Churn Law v. Rohini Kumar Sirkar*, 37 C.W.N. 1038: 58 C.L.J. 18: A.I.R. 1934 Cal. 119: 148 I.C. 160; *Chundi Charan Laha v. Jiban Kumar Majumdar*, 53 C.L.J. 516.

3. Sub-sec. (2) :—Where a landlord is found to have instituted a suit for *bhaoli* rent against his tenant without reasonable and probable cause the defendant is, under the provisions of sec. 68 (2) of the B. T. Act, entitled to be awarded damages of twenty-five per cent. of the whole amount claimed: *Brindaban Prasad v. Banku Behari Mitra*, 15 Pat. 295: A.I.R. 1936 Pat. 595.

Defendant, when entitled to damages.

69. (Order for appraising or dividing produce.) Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 45.

70. (Procedure where officers appointed.) Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 45.

71. (Rights and liabilities as to possession of crop.) Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 45.

Liability for rent on change of landlord or after transfer of tenure or holding.

72. (1) A tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which became due after the transfer and was paid to the landlord whose interest was so transferred,

Liability for rent on change of landlord or after transfer of tenure or holding. Tenant not liable to

transferee of landlord's interest for rent paid to former landlord without notice of the transfer.

unless the transferee has before the payment given notice of the transfer to the tenant.

(2) Where there is more than one tenant paying rent to the landlord whose interest is transferred, a general notice from the transferee to the tenants published in the prescribed manner shall be a sufficient notice for the purposes of this section.

Liability for rent before transfer of occupancy-holding.

73. When an occupancy-*raiyat* transfers his holding in whole or in part the transferor and transferee shall be jointly and severally liable to the landlord for arrears of rent due before the transfer :

Provided that the transferor shall not be liable to the landlord for such arrears of rent if the transferee has agreed to pay such arrears to the landlord and the fact has been mentioned in the instrument of transfer.

I. Retrospectivity :—This section as amended by the Amending Act of 1928 has no retrospective operation. The transferors of a holding are therefore liable for the arrears of rent of the holding for the years prior to the date of the coming into operation of the amended section : *Amirul Islam v. Sarada Kumar Sen*, 40 C.W.N. 149 : 165 I.C. 249.

2. Proviso :—The proviso to this section deals with a case where the liability to pay the entire rent has been taken over by the transferee. Such arrears must obviously refer to the whole of the arrears due. Where there has been a transfer by one of the tenants only, and the transferee has not taken upon himself to pay the whole of the arrears due, the proviso can have no application, and under the first part of sec. 73, the transferor and the transferee, whether be of the whole of the holding or of a part, would be jointly and severally liable for the whole of the arrears due : *Amirul Islam v. Sarada Kumar Sen*, 40 C.W.N. 149 : 165 I.C. 249.

Illegal cesses, etc.

Abwab, etc., illegal.

Illegal cesses, etc.

74. (1) All impositions upon tenants under the denomination of *abwab*, *mathat* or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void.

(2) All impositions upon tenants of road cess or public works cess, or of both,—

- (a) in excess of the net amount fixed by clause (2) of section 41 of the Cess Act, 1880, or
- (b) on any scale in excess of that required by clause (3) of that section,

levied in addition to the actual rent, shall be illegal, and all stipulations and reservations for payment of any such excess contained in any contract made between a landlord and a tenant on or after the 13th day of October, 1880, shall be void :

Provided that nothing in this sub-section shall affect the terms of a written contract registered before the commencement of the Bengal Tenancy (Amendment) Act, 1919 :

Ben. Act
III of
1919.

Provided also that, subject to the provisions of sec. 72 of the Indian Contract Act, 1872, no suit shall lie for the recovery of anything paid before the commencement of the Bengal Tenancy (Amendment) Act, 1919, on account of the impositions referred to in sub-sec. (2).

IX of
1872.

(3) Nothing in this section shall be deemed to affect the terms of a permanent *mukarrari* lease granted by a proprietor or holder of a permanent tenure in a permanently settled area and registered before the commencement of the Bengal Tenancy (Amendment) Act, 1928.

Ben. IV of
1928.

1. Fine for realisation of Abwab :—*See new sec. 74A inserted by the B. T. (Amendment) Act VI of 1938.*

2. What is an abwab and what is not :—Whether a stipulation to pay a sum, goat, molasses or any other thing over and above rent mentioned in a lease is an abwab or forms part of the rent is a question of fact to be decided in each particular case : *Abdul Gani Choudhury v. Angri Bhiku*, 56 Cal. 919 : A.I.R. 1930 Cal. 205 : 122 I.C. 212.

Where in the kabuliyat, the tenants stated that they had been in the habit of delivering to the landlords fixed quantities of straw and husks as part of their rent according to the village custom and they undertook to continue to deliver these quantities as part of the rent, as much a part of the consideration of the tenancy as the money payment, the clause is valid and enforceable and the mere fact that it is imposed by a separate clause does not make it an abwab or illegal exaction : *Nawnit Prayaji v. Bidhu Mahton*, A.I.R. 1931 Pat. 161 : 132 I.C. 97.

Straw and
husk.

It is quite possible for tenants to be inducted upon a land upon an agreement to pay the customary rent and that is a perfectly good contract and on proof of what has been customary such rent is leviable where customary rate for cultivation of sugar cane and vegetables which was agreed upon was in excess of the old rate, *held*, that the said customary rent was the actual rent agreed upon and it was not an abwab : *Surjo Mohan Thakur v. Chhote Singh*, 174 I.C. 447.

"Actual
rent".

The "actual rent" within the meaning of this section, in a case of a permanent tenure which came into existence before the passing of the B. T. Act, would be the amount recoverable as rent under clause (3), Regulation V of 1812, that is to say, the whole specific sum which the permanent tenure-holder agreed to pay when his tenure was created whether it contained abwab or not: *Gopal Saran v. Maheswari Prasad*, 8 Pat. 655: A.I.R. 1929 Pat. 307: 119 I.C. 65.

Moltana.

Where in a kistibandi patta the instalments put down include a small expense of *moltana* to be paid along with every instalment, and the document is of old times and record-of-rights shows the amount of instalments inclusive of *moltana* as the rent, the small sum cannot be deemed to be an *abwab*: *Sachindra Kumar Roy v. Purna Chandra Pal*, A.I.R. 1936 Cal. 541.

Falkar on trees existing at inception of tenancy of occupancy holding, if *abwab* when imposed on part of rent. Gratuitous service.

The imposition if *falkar* on the trees standing on an occupancy holding at the inception of the tenancy, as a part of the consideration for the use and occupation of the demised land is not an *abwab*: *Manager, Murshidabad Estate v. Hira Bewa*, 41 C.W.N. 88.

A contract to do gratuitous service for a certain number of days in a year in lieu of rent is not illegal as being against public policy nor is it illegal for being indefinite and arbitrary under sec. 3 of Reg. V of 1812. Contract to do gratuitous service in lieu of rent, in this case was governed by the T. P. Act and not by the B. T. Act: *Radhuhari v. Narendra Nath Chatterjee*, 56 Cal. 862: 49 C.L.J. 189: A.I.R. 1929 Cal. 224.

Neg and dak cess.

Realisation of *neg* and *dak* cess from tenant not as rent is *abwab*: *Rameshwardhari Singh v. Mahabir Singh*, A.I.R. 1930 Pat. 76.

'Malguzari'.

The word "*malguzari*" or the words "*malguzari bakeya*" cannot be limited to the "actual rent": *Hasan Imam v. Brahmedo Singh*, A.I.R. 1930 Pat. 301.

Fine for realisation of *abwab*, etc.

74A. (1) If a landlord or his agent realises from a tenant any imposition declared under sub-sec. (1) of sec. 74 to be illegal, such landlord or agent, as the case may be, shall be liable to the same fine, to be imposed in the same manner, as in sub-section (3) of section 58, and the provisions of sub-sections (4), (7) and (8) of the said section relating to inquiry, fine and procedure shall, *mutatis mutandis* and so far as may be, apply to proceedings under this section.

(2) An appeal shall lie to the District Judge against an order imposing a fine under this section, and the order passed by the District Judge on such appeal shall be final.

(3) The imposition of a fine on a landlord or landlord's agent under this section shall not operate as a bar to the institution of a suit under section 75.

Amendment :—This section is new and was inserted by the B. T. (Amendment) Act VI of 1938, s. 20.

An amendment was moved to make realisation of abwab a penal offence. It was ruled out of order. The word "*realises*" was substituted for the word "*exacts*" occurring in the Bill by an amendment in the Assembly. Sub-secs. (2) and (3) were inserted by the Council.

75. Every tenant from whom, except under any special enactment for the time being in force, any sum of money or any portion of the produce of his land is exacted by his landlord in excess of the rent or road cess or public works cess or interest lawfully payable, may, subject to the second proviso to sub-section (2) of section 74 within six months from the date of the exaction, institute a suit to recover from the landlord, in addition to the amount or value of what is so exacted, such sum by way of penalty as the Court thinks fit, not exceeding two hundred rupees; or, when double the amount or value of what is so exacted exceeds two hundred rupees, not exceeding double that amount or value.

Penalty for exaction by landlord from tenant of sum in excess of the rent payable.

Suspension of provisions relating to enhancement of rent.

75A. (1) All the provisions of this Act relating to enhancement of rent are hereby suspended for a period of ten years with effect from the twenty-seventh day of August, 1937.

Suspension of provisions relating to enhancement of rent.

(2) (a) All decrees and orders enhancing rent passed under any of the provisions of this Act on or after the twenty-seventh day of August 1937 and before the date of the commencement of the Bengal Tenancy (Amendment) Act, 1938, are hereby declared to be inoperative from the date of such decree or order until the expiry of the ten years referred to in sub-section (1).

Ben. Act VI of 1938.

(b) Any provision providing for enhancement of rent contained in any contract entered into between a landlord and a tenant during the period of ten years referred to in sub-section (1) is hereby declared to be inoperative during the said period.

(3) Notwithstanding anything contained in this Act or any other law, the period during which a decree, order or contract is rendered inoperative under this section shall not be taken into account in computing any period under the law of limitation nor in construing the terms of a contract.

Amendment :—*This section is new and was inserted by the B. T. (Amendment) Act VI of 1938, s. 21.*

[Sec. 75A as proposed in the B. T. (Amendment) Bill, 1937 was as follows:—

"The Provincial Government may, by notification in the Official Gazette, suspend with effect from the twenty-seventh day of August, 1937, or from such later date whether before or after the commencement of the Bengal Tenancy (Amendment) Act, 1937, in such area and for such period as may be specified in the notification, any or all of the provisions of this Act, except Section 52, relating to either the enhancement or reduction of rent or both."]

Sub-secs. (1), (2) (a) and (b) (excepting certain alterations made by the Council) were substituted for sec. 75A as proposed in the Bill by an amendment moved by the *Revenue Minister* in the Assembly. Sub-sec. (3) was inserted by the Council. The words "*(including sec. 52)*" which occurred in sub-secs. (1) and (2) (a) of sec. 75A in the B. T. (Amendment) Bill, 1938 as passed by the Legislature were omitted by the Legislature on the recommendation of the Governor under sec. 75 of the Government of India Act. See notes under heading No. 1 at p. 2 and notes under sec. 52.

CHAPTER IX.

MISCELLANEOUS PROVISIONS AS TO LANDLORDS AND TENANTS.

Improvements.

*Improve-
ments.*

76. (1) For the purposes of this Act, the term “improvement”, used with reference to a holding, shall mean any work which adds to the value of the holding which is suitable to the holding and consistent with the purpose for which it was let, and which, if not executed on the holding, is either executed directly for its benefit, or is, after execution, made directly beneficial to it.

Definition
of
“improve-
ment.”

(2) Until the contrary is shown, the following shall be presumed to be improvements within the meaning of this section :—

- (a) the construction of wells, tanks, water-channels and other works for the storage, supply or distribution of water for the purposes of agriculture, or for drinking or for the use of men and cattle employed in agriculture;

Explanation.—Such construction on agricultural land shall not be deemed to impair the value of the land or to render it unfit for the purposes of the tenancy;

- (b) the preparation of land for irrigation;
- (c) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or waste land which is cultivable;
- (d) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;
- (e) the renewal or reconstruction of any of the foregoing works, or alterations therein or additions thereto; and

(f) the erection of a dwelling-house, whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices.

(3) But no work executed by the tenant of a holding shall be deemed to be an improvement for the purposes of this Act if it substantially diminishes the value of his landlord's property.

'Dwelling house.'

Notes : Sub-sec. (2) (f) : Dwelling house : Out-offices :—The right to erect a dwelling house is a right belonging to the tenant and to no other, and the tenant is entitled to do so only for the benefit of himself and his family: *Jogesh Chandra Das v. Hem Chandra Ghose*, A.I.R. 1936 Cal. 243 : 162 I.C. 617.

'Out-offices.'

The word "out-offices" is not sufficiently clear and comprehensive in the matter of the intention of the Legislature; and the clauses which specify what constitutes improvements within the meaning of sec. 76 cannot be taken to be exhaustive. The erection of a *pucca mandop* for the performance of annual *Pujas* as an appurtenance of the dwelling house of an occupancy raiyat when it is not shown that the *mandop* is being erected as a temple for the use not only of the raiyat but also of other persons is an improvement within this section and an occupancy raiyat is entitled to erect such a *pucca mandop*: *Akhoy Kumar Saha v. Kamini Kumar Saha*, 39 C.W.N. 422 : A.I.R. 1935 Cal. 459 : 153 I.C. 963.

Right to make improvements in case of holding at fixed rates and occupancy-holding.

77. (1) Neither the tenant nor his landlord shall, as such, be entitled to prevent the other from making an improvement in respect of the holding, except on the ground that he is willing to make it himself.

(2) If both the tenant and his landlord wish to make the same improvement the tenant shall have the prior right to make it, unless it affects another holding or other holdings under the same landlord.

(3) Any fee realised from a tenant for permission to make any improvement in respect of his holding shall be deemed to be an *abwab* and the provisions of sub-section (1) of section 74 shall apply thereto.

Collector to decide question as to right to make improvement, etc.

78. If a question arises between the *raiyyat* or under-*raiyyat* and his landlord—

(a) as to the right to make an improvement, or

(b) as to whether a particular work is an improvement,

the Collector may, on the application of either party, decide the question, and his decision shall be final.

79. (*Right to make improvements in case of non-occupancy holding*). *Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 51.*

80. (1) A landlord may, by application to such Revenue-officer as the Local Government may appoint, register any improvement which he has lawfully made or which has been lawfully made wholly or partly at his expense or which he has assisted a tenant in making.

Registration of landlord's improvements.

(2) The application shall be in such form, shall contain such information, and shall be verified in such manner, by local inquiry or otherwise, as the Local Government from time to time prescribes.

(3) The officer receiving the application may reject it if it has not been made within twelve months —

(a) in the case of improvements made before the commencement of this Act—from the commencement of this Act;

(b) in the case of improvements made after the commencement of this Act—from the date of the completion of the work.

Notes :—This section is an enabling section and a landlord may register an improvement: *Madan Mohan Choudhury v. Kali Charan Sirkar*, 42 C.W.N. 126.

81. (1) If any landlord or tenant of a holding desires that evidence relating to any improvement made in respect thereof be recorded, he may apply to a Revenue-officer, who shall thereupon, at a time and place of which notice shall be given to the parties, record the evidence, unless he considers that there are no reasonable grounds for making the application, or it is made to appear that the subject-matter thereof is under inquiry in a Civil Court.

Application to record evidence as to improvement.

(2) When any matter has been recorded under this section, the record thereof shall be admissible in evidence in every subsequent proceeding between the landlord and tenant or any persons claiming under them.

82. (1) Every *raiyat* or under-*raiyat* who is ejected from his holding shall be entitled to compensation for improvements which have been made in respect thereof in accordance with this Act by him, or by his predecessor in interest, and for which compensation has not already been paid.

Compensation for *raiyats'* improvements.

(2) Whenever a Court makes a decree or order for the ejectment of a *raiyat* or under-*raiyat*, it shall determine the amount of compensation (if any) due under this section to the *raiyat* or under-*raiyat* for improvements, and shall make the decree or order of ejectment conditional on the payment of that amount to the *raiyat* and under-*raiyat*.

(3) No compensation under this section for an improvement shall be claimable where the *raiyat* or under-*raiyat* has made the improvement in pursuance of a contract or under a lease binding him, in consideration of some substantial advantage to be obtained by him, to make the improvement without compensation, and he has obtained that advantage.

(4) Improvements made by a *raiyat* or under-*raiyat* between the second day of March, 1883, and the commencement of this Act, shall be deemed to have been made in accordance with this Act.

(5) The Local Government may, from time to time, by notification in the official gazette, make rules requiring the Court to associate with itself, for the purpose of estimating the compensation to be awarded under this section for an improvement, such number of assessors as the Local Government thinks fit, and determining the qualifications of those assessors, and the mode of selecting them.

83. (1) In estimating the compensation to be awarded under section 82 for an improvement, regard shall be had—

- (a) to the amount by which the value, or the produce, of the holding, or the value of that produce, is increased by the improvement;
- (b) to the condition of the improvement, and the probable duration of its effects;
- (c) to the labour and capital required for the making of such an improvement;
- (d) to any reduction or remission of rent or any other advantage given by the landlord to the *raiyat* or under-*raiyat* in consideration of the improvement; and
- (e) in the case of a reclamation or of the conversion of unirrigated into irrigated land, to

Principle on which compensation is to be estimated.

the length of time during which the *raiyyat* or under-*raiyyat* has had the benefit of the improvement at an unenhanced rent.

(2) When the amount of the compensation has been assessed, the Court may, if the landlord and *raiyyat* or under-*raiyyat* agree, direct that, instead of being paid wholly in money, it shall be made wholly or partly in some other way.

Acquisition of land for building and other purposes. Acquisition of land for building and other purposes.
Acquisition of land for building and other purposes.

84. A Civil Court may, on the application of the landlord of a holding, and on being satisfied that he is desirous of acquiring the holding or part thereof for some reasonable and sufficient purpose having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground, or for any religious, educational or charitable purpose,

and on being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient,

authorize the acquisition thereof by the landlord upon such conditions as the Court may think fit and require the tenant to sell his interest in the whole or such part of the holding to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant.

85. (*Restrictions on sub-letting.*) *Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 53.*

Surrender and abandonment.

85A. (1) A tenure-holder may apply to the Court for permission to surrender a tenure. Surrender by tenure-holders.

(2) An application under sub-section (1) shall be in the prescribed form, shall give particulars, *inter alia*, of under-tenure-holders and *raiyyats*, if any, holding directly under the tenure sought to be surrendered, and of any incumbrances upon the said tenure, and shall be accompanied by the process fee prescribed for service of notices upon the landlord or his common agent, if any, under-tenure-holders and *raiyyats*, if any, referred to above and incumbrancers, if any.

(3) If the Court, after hearing the parties, grants permission for the surrender of the tenure, it shall impose such equitable conditions as it may think proper.

(4) An appeal shall lie to the ordinary Civil Appellate Court from any order of a court under this section.

Amendment :—*This section is new and was inserted by the B. T. (Amendment) Act VI of 1938, s. 22. Sub-sec. (4) was inserted by the Council.*

Surrender.

86. (1) A *raiyat* or under-*raiyat* not bound by a lease or other agreement for a fixed period may, at the end of any agricultural year, surrender his holding.

(2) But, notwithstanding the surrender, the *raiyat* or under-*raiyat* shall be liable to indemnify the landlord against any loss of the rent of the holding for the agricultural year next following the date of the surrender, unless he gives to his landlord, at least three months before he surrenders, notice of his intention to surrender.

(3) When a *raiyat* or under-*raiyat* has surrendered his holding, the Court shall, in the following cases for the purposes of sub-section (2), presume, until the contrary is shown, that such notice was so given, namely :—

(a) if the *raiyat* or under-*raiyat* takes a new holding in the same village from the same landlord during the agricultural year next following the surrender;

(b) if the *raiyat* or under-*raiyat* ceases, at least three months before the end of the agricultural year at the end of which the surrender is made, to reside in the village in which the surrendered holding is situate.

(4) The *raiyat* or under-*raiyat* may, if he thinks fit, cause the notice to be served through the Civil Court within the jurisdiction of which the holding or any portion of it is situate.

(5) When a *raiyat* or under-*raiyat* has surrendered his holding the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself.

(6) When a holding is subject to an incumbrance secured by a registered instrument, or when there is

an under-*raiyyat* on the holding or part thereof the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbent or the under-*raiyyat*, as the case may be.

(7) Save as provided in sub-section (6) nothing in this section shall affect any arrangement by which a *raiyyat* or under-*raiyyat* and his landlord may arrange for a surrender of the whole or a part of the holding.

I. Amendment:—After the word "*raiyyat*" in all places in which it occurs in this section, the words "*or under-raiyyat*" were inserted by the B. T. (Amendment) Act VI of 1938, s. 23.

2. Effect of Amendment:—An under-*raiyyat* also can surrender his holding.

Old.

86A. (1) If—

Effect of exemption from payment of rent or abatement of rent on account of diluvion.

(i) the lands of a tenure or holding are wholly lost by diluvion and the tenant obtains on that account exemption from payment of rent in respect of such tenure or holding,

(ii) any portion of the lands of a tenure or holding is lost by diluvion and the tenant obtains on that account an abatement of rent in respect of such portion,

the tenant shall, unless there is a contract to the contrary made by registered instrument, be deemed to have surrendered his rights in such lands or portion thereof,

New

86A. (1) If the lands of a tenure or holding or a portion of such lands are lost by diluvion, the rent of the tenure or holding shall be abated by an amount which bears the same proportion to the rent of the whole tenancy, as the area lost bears to that of the whole tenancy.

Abatement of rent on account of diluvion and re-entry into lands which re-appear.

(2) (a) Notwithstanding anything contained in this Act or any other law or any contract to the contrary, the right, title and interest of the tenant or his successors-in-interest shall subsist in such lands or portion thereof during the period of loss by diluvion not exceeding twenty years and the tenant or his successors-in-interest shall have right to immediate possession on the reappearance of such

Old.

as the case may be, and his tenancy and rights therein shall be extinguished.

(2) Nothing in this section shall prevent the accrual of rights under the operation of any other enactment in any portion of the lands of a tenure or holding which have been lost by diluvion, if such lands thereafter re-appear as an accretion thereto.

New

lands or portion thereof within twenty years of the loss by the diluvion, and the landlord shall have right to the arrears of rent without interest or damage in respect of the land which has reappeared for the period during which it was lost or for four years whichever is less.

(b) The rent of the lands which have reappeared, shall for the purposes of the payment both of the arrears of rent under this sub-section and of the rent due thereafter (until such rent is modified in accordance with the provisions of this Act) be calculated on the rent of the remainder of the tenancy existing when possession of the lost lands is resumed, and shall bear the proportion to that rent which the area of the lands which have reappeared bears to that of the remainder of the tenancy :

Provided that in cases where the entire tenure or holding has been lost by diluvion, the rent of the portion thereof which reappears shall be calculated in like manner on the rent existing when the entire tenancy was lost.

(3) Nothing shall prevent the accrual of rights under the operation of any other enactment in any

New

portion of the lands of a tenure or holding which have been lost by diluvion, if such lands thereafter reappear as an accretion thereto.

Amendment :—New sec. 86A was substituted for old sec. 86A by the B. T. (Amendment) Act VI of 1938, sec. 24.

87. (1) If a *raiyat* or under-*raiyat* voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due, and ceases to cultivate his holding either by himself or by some other person, the landlord may, at any time after the expiration of the agricultural year in which the *raiyat* or under-*raiyat* so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself. Abandonment.

(2) Before a landlord enters under this section, he shall file a notice in the prescribed form in the Collector's office, stating that he has treated the holding as abandoned and is about to enter on it accordingly; and the Collector shall cause a notice to be published in the prescribed manner.

(3) When a landlord enters under this section, the *raiyat* or under-*raiyat* shall be entitled to institute a suit for recovery of possession of the land at any time not later than the expiration of two years, or, in the case of a non-occupancy-*raiyat*, six months, from the date of the publication of the notice; and thereupon the Court may, on being satisfied that the *raiyat* or under-*raiyat* did not voluntarily abandon his holding, order recovery of possession on such terms, if any, with respect to compensation to persons injured and payment of arrears of rent as to the Court may seem just.

(4) Where the whole or part of a holding has been sub-let by a registered instrument, the landlord shall, before entering under this section, on the holding, offer the whole holding to the sub-lessee for the remainder of the term of the sub-lease at the rent paid by the *raiyat* or under-*raiyat* who has ceased to cultivate the holding, and on condition of the sub-lessee paying up all arrears due from that *raiyat* or under-

raiyat. If the sub-lessee refuses or neglects within two months to accept the offer, the landlord may avoid the sub-lease and may enter on the holding and let it to another tenant or cultivate it himself as provided in sub-sections (1) and (2).

(5) If an under-*raiyat* has—

- (a) a right of occupancy in a holding or portion thereof, or
- (b) been admitted in a document by the landlord to have a permanent and heritable right in his land, or
- (c) been in possession of his land for a continuous period of twelve years whether before or after or partly before and partly after the commencement of the Bengal Tenancy (Amendment) Act, 1928, or has a homestead thereon,

the landlord shall, before entering on the holding, under this section, offer the whole holding, or part thereof, to the under-*raiyat* at the rent paid by him to the *raiyat* and on condition of the under-*raiyat* paying up all arrears due from that *raiyat* and a *salami* of five times the aforesaid rent. If the under-*raiyat* refuses or neglects within two months to accept the offer, the landlord may avoid the sub-tenancy and may enter on the holding and let it to another tenant, or cultivate it himself, as provided in sub-sections (1) and (2).

Headings of Notes.

- 1. SEC. 87 NOT EXHAUSTIVE.
- 2. ABANDONMENT.
- 3. MISCELLANEOUS.

I. Sec. 87 not exhaustive:—Sec. 87 is not exhaustive. It does not prescribe the only mode in which a holding can be abandoned and there can be abandonment apart from the provisions of this section: *Golam Mustapha v. Hanumandas Mundra*, 61 Cal. 937: A.I.R. 1935 Cal. 80: 155 I.C. 321. This right of the landlord to re-enter when his land remains unoccupied or is in the occupation of a trespasser is a right conferred upon him under the general law: *Abdul Majid Bhuiya v. Ali Mia*, 58 Cal. 869: 35 C.W.N. 217. See also *Baikuntha Chandra Roy v. Chandranath Bandopadhyaya*, 33 C.W.N. 1023.

2. Abandonment:—As to whether there has been an abandonment or not within the meaning of sec. 87 is in each case a question of fact. At the same time the inference from facts found as to whether there was abandonment or not is a question of law: *Ramdhari Rai v. Gorakh Rai*, 10 Pat. 264: A.I.R. 1931 Cal. 236: 133 I.C. 34. In order that there might be an abandonment within the meaning of this section, there must be a finding that the tenant had left the village in which the holding was situated without making arrangement for payment of the rent: *Ibid.*

Inference from facts found as to abandonment, question of law.

Where the tenant made a gift of a certain non-transferable occupancy holding without notice to the landlord and without his previous or subsequent consent, and the landlord brought a suit to eject the tenant, *held*, although transfer by gift may in certain circumstances, amount to or result in abandonment, no inference of abandonment can be drawn where the legal rights of the landlord have not been materially affected; and the landlord has consequently no right to take *khas* possession of the land: *Pratap Chandra Ghosh v. Ramani Mohon Ghosh*, 60 Cal. 219: A.I.R. 1933 Cal. 377: 144 I.C. 131.

Gift.

Where the tenant of a non-transferable occupancy holding sold it to the plaintiff with the reservation that the former was to continue in possession of a homestead plot forming part of the holding, it cannot be treated as transfer of the whole interest in the holding but only as a transfer of a part. It does not amount to an abandonment so as to justify the re-entry of the landlord: *Hiralal Ghose v. Sheikh Imanuddi*, 36 C.W.N. 478: 56 C.L.J. 256: A.I.R. 1932 Cal. 584: 139 I.C. 227.

Sale with reservation.

When the transferor is in possession of a part of the holding by taking a sub-lease, whether such part be the homestead or agricultural land, and the transferee has been paying rent to the landlord in the transferor's name, there is neither abandonment nor repudiation of the tenancy: *Sasthi Charan Banik v. Manindra Lal Singha*, 40 C.W.N. 155: 61 C.L.J. 545: A.I.R. 1936 Cal. 168.

Transferor in possession of part on taking sub-lease.

The mere execution of a usufructuary mortgage, even of the whole of the holding, may not itself constitute an abandonment on the part of the tenant, especially when the mortgage-deed provided that the tenant-mortgagor would continue to pay the rent to the landlord. If, however, the tenant after the execution of the mortgage defaulted in payment of rent to the landlord who secured a decree for arrear of rent, brought the holding to sale, himself became the purchaser and got possession, the execution of usufructuary mortgage *plus* the sale in execution proceedings are sufficient to constitute a complete abandonment on the part of the tenant: *Sarat Kumar Banerjee v. Munshi Abdul Bary*, 36 C.W.N. 844: A.I.R. 1933 Cal. 49: 142 I.C. 33.

Usufructuary mortgage.

The question of abandonment must be adjudged by the intention of the tenants concerned: *Rudra Narain Singh v. Kedar Nath Singh*, A.I.R. 1937 Pat. 458: 170 I.C. 754.

Intention.

The burden of proof is on the landlord seeking to exercise or justify his right of re-entry to prove abandonment on the part of the tenant: *Hiralal Ghose v. Sheikh Imanuddi*, 36 C.W.N. 478: 56 C.L.J. 256: A.I.R. 1932 Cal. 584: 139 I.C. 227.

Onus to prove abandonment.

3. Miscellaneous :—A person who has purchased a portion of a non-transferable occupancy holding is entitled, where nevertheless the original raiyats had not abandoned the holding and had not transferred the whole of it, to resist the landlord from recovering possession and to have it declared that a decree obtained by the landlord for the eviction of his tenants as *thika* tenants was fraudulent and collusive and not binding on him : *Bijoy Krishna Bosu v. Benode Behari Pramanik*, 59 Cal. 1155 : 36 C.W.N. 535 : A.I.R. 1932 Cal. 479 : 138 I.C. 463.

Old.

New

Subdivision of tenancy.

88. A division of a tenure or holding, or distribution of the rent payable in respect thereof, shall not be binding on the landlord unless it is made with his express consent in writing or with that of his agent duly authorized in that behalf :

Provided that, if there is proved to have been made in any landlord's rent-roll any entry showing that any tenure or holding has been divided or that the rent payable in respect thereof has been distributed, such landlord may be presumed to have given his express consent in writing to such division or distribution :

Provided further that (1) no division of a tenure or holding or distribution of rent shall be valid unless made with the consent of all the co-sharer landlords and co-sharer tenants and (2) also that when a landlord with-

88. (1) Save as provided elsewhere in this section, a division of a tenure or holding or a distribution of the rent payable in respect thereof shall not be valid unless such division or distribution has been expressly consented to in writing by both--

(a) the landlord or the entire body of landlords or their agents duly authorised in that behalf, and

(b) all the co-sharer tenants :

Provided that, if there is proved to have been made in any landlord's rent-roll any entry showing that any tenure or holding has been divided or that the rent payable in respect thereof has been distributed, such landlord may be presumed to have given his express consent in writing to such division or distribution.

Division of tenancy not binding on landlord without his consent.

Division of tenancy not valid unless consented to by all parties or ordered by Civil Court.

Old.

holds his consent to the division of a tenancy or to the distribution of rent on the application of a tenant made on that behalf, or when a co-sharer tenant withholds his consent to such subdivision of tenancy or distribution of rent, or when a co-sharer tenant considers himself aggrieved by a division of the tenancy or distribution of the rent made by the landlord, the Civil Court may, on an application made on that behalf by the tenant within six months from the date of notice to the landlord hereinafter provided, by an order in writing direct such division of the tenancy or distribution of rent as it considers fair and equitable or annul or modify the division or distribution made by the landlord, if considered unfair and inequitable.

Nothing herein contained shall be deemed to authorize a Court to make an order for subdivision of the tenancy or distribution of rent,

(i) if the division results in the creation of unreasonably small holdings;

(ii) if the distribution of rent results in bringing the rent

New

(2) The Civil Court, on application made to it by one or more co-sharer tenants for a division of a tenure or holding or for a distribution of the rent payable in respect thereof, or for the annulment or modification of a previous division or distribution other than one made under this sub-section or under an agreement made between all the landlords and co-sharer tenants in conformance with the provisions of sub-section (1), may, by order in writing, direct such division of the tenure or holding or such distribution of rent as the Court considers fair and equitable, or annul or modify a division or distribution previously made other than one of the nature referred to above if the Court considers it unfair and inequitable:

Provided that—

(a) no such order shall be passed without notice to the landlord or the entire body of landlords or their common agent, if any, and to the remaining co-sharer tenants, the prescribed process-fee for which shall accompany the application;

Old.

for any portion below Rs. 2-8 in case of holdings and Rs. 4 in case of tenures.

No Court shall make any such order without notice of the application made to it to all the landlords and tenants, and no such application as is provided for in this proviso shall be made without a notice of the same sent to the landlord or other co-sharer tenants or both as the case may be by registered post.

Every order of the Court directing division of the tenancy or distribution of rent shall also direct payment by the applicant to the landlord of a mutation fee being equal to twice the amount of rent made payable by the tenant in case of tenures, and four times such rent in case of holdings.

New

(b) no order for division or distribution shall be made which would result in bringing the rent for any portion below two rupees in the case of tenures or one rupee in the case of holdings; and

(c) nothing contained in this sub-section shall be deemed to authorise a Court on an application for division or distribution to direct a division or distribution in respect of the share of any tenant other than an applicant under this sub-section or a co-sharer tenant who has been joined as a co-applicant under sub-section (3).

(3) On receipt of notice of an application for division or distribution under sub-section (2) a co-sharer tenant may apply to be joined as a co-applicant, and upon such application the Court shall join the said co-sharer tenant as a co-applicant without further notice to the landlord or landlords and the remaining co-sharer tenants.

(4) Every order of a Court under sub-section

New

(2) directing division of a tenure or holding or a distribution of the rent thereof shall also direct payment to the landlord of one rupee as mutation fee by each applicant or each body of applicants including co-applicants, if any, joined under sub-section (3).

(5) Every order referred to in sub-section (4) shall state the date from which the division or distribution shall have effect and the joint and several liability of each co-sharer tenant for arrear of rent, if any, up to that date, shall subsist in all the lands of the entire tenure or holding.

(6) An appeal shall lie to the ordinary Civil Appellate Court from an order of a Court under this section, provided that it is presented within thirty days from the date of such order and is accompanied by the prescribed fee.

Amendment:—*New sec. 88 was substituted for old sec. 88 by the B. T. (Amendment) Act VI of 1938, s. 25.*

(Case law under old Sec. 88)**Headings of Notes.**

1. SUBDIVISION OF TENANCY.
2. DISTRIBUTION OF RENT.
3. CONSENT OF LANDLORD.

I. Subdivision of Tenancy :—Whether a tenancy has been divided or not is mainly a question of fact in each case. Separate shareholders in the landlord's family may collect a separate share of

Tenancy whether divided or not, mainly a question of fact.

the rent without either party intending to divide the tenure and similarly the landlord may collect separate shares of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a subdivision has been made is really the question whether the parties have come to a fresh agreement: *Prafulla Nath Tagore v. Satya Bhusan Das*, 56 I.A. 238: 57 Cal. 205: 33 C.W.N. 822: A.I.R. 1929, 171 (P.C.).

Dakhila.

Where the settlement record shows that there is one tenancy, the presumption is that it is not split up unless rebutted by other evidence. Where one rental is mentioned but names of two tenants it does not show that the tenancy is split up; it shows that the tenancy belongs to two persons jointly: *Surendra Nath Mondal v. Bhudhar Chandra Safui*, 67 C.L.J. 136: A.I.R. 1938 Cal. 690. The construction of *dakhila* with regard to the question of splitting up is to be treated as a question of fact and not of law: *Ibid.*

Ordinarily when a portion of a holding is purchased with separate rental assigned to it and the purchase is recognised by the landlord, the purchased portion would constitute a separate holding by itself, the remaining portion in the possession of the old raiyat constituting another; *Shiva Prasad Singh v. Mt. Deoki Kuar*, A.I.R. 1938 Pat. 379: 175 I.C. 61.

If there was no effective splitting up of holding as required by sec. 88 before the partition so as to be binding upon the entire body of landlords, they are not bound to treat the holding as subdivided after the partition, merely because they became the sole landlords as a result of the partition: *Srinandan Prasad Singh v. Mithan Mahton*, 14 Pat. 207: A.I.R. 1935 Pat. 11: 155 I.C. 28.

Landlord.

What is contemplated by sec. 88 is the actual division of the holding into two or more definite units. *Ibid.* A landlord in sec. 88 means the entire body of landlords: *Ibid.*

2. Distribution of rent:—What is to be seen in order that the rent of a portion does not go below the specified limit is the rent payable for the portion of the applicant or applicants jointly and that for the remaining tenants jointly or where there is more than one application, the portion of the applying tenant or tenants on each application and that of the rest and not the rent for the portion of each individual tenant in the tenancy: *Shib Krishna Sinha Sarma v. Atarjama Khan*, 39 C.W.N. 1276. Where there is a distribution of rent among the tenants, the Court may modify or annul such distribution if considered unfair and inequitable: *Ibid.*

3. Consent of landlord:—It is not necessary that it should be proved that the landlord has withheld his consent, it is sufficient if a notice of such application has been served upon the landlord within six months of the application: *Shib Krishna Sinha Sarma v. Atarjama Khan*, 39 C.W.N. 1276.

Ejectment.

Ejectment.

No ejectment except in execution of decree. Onus on plaintiff to

89. No tenant shall be ejected from his tenure or holding except in execution of a decree.

I. Onus in Ejectment suit:—Where the plaintiff claims certain *mouza* as appertaining to his permanently settled estate and the defendant on the other hand asserts that it is the *lakheraj* debutter

of an idol, the burden of proof is on the plaintiff to show that the *mouza* was included in the *mal* assets of the estate at the date of the Permanent Settlement, in other words, that it falls within his regularly assessed *Mahal*: *Kumar Rajkrishna Prasad Lal Singh Deo v. Barbani Coal Concern Ltd.*, 60 C.L.J. 477.

show land in suit being included in *mal* assets of the estate.

A landlord is entitled to eject a tenant after notice to quit unless the tenant can prove, that he has a right to remain on the land permanently and the onus is on the tenant to prove the permanency of his tenancy: *Golam Hossain Ostagar v. Abu Bakkar*, A.I.R. 1936 Cal. 851.

Onus on tenant to prove permanency of tenancy.

2. Notice to quit.—The plaintiff was the sole owner of a *bastu*, but only a co-owner of a tank. He let out the *bastu* to the defendant separately, but joined his co-sharers (not parties to the suit) in letting out the tank. The defendant was thus a tenant of both. Plaintiff's authorised agent sent a notice to quit requiring the defendant to vacate both the *bastu* and the tank, *held*, the notice, so far as it concerned the tank, was invalid, but the invalidity did not make the notice bad as to *bastu* and the defendant was liable to be ejected from the *bastu* on the basis of the notice: *Panchu Charan Adak v. Benode Behari Haldar*, 39 C.W.N. 246: A.I.R. 1935 Cal. 577: 157 I.C. 1115.

A tenancy to continue from year to year is a continuing tenancy so long as the parties are satisfied; and though terminable at the option of either party at the end of any year, it is not *ipso facto* terminated at the end of every year. A reasonable notice to quit is necessary in such a case; and if it is one according to the Bengali year a six months' notice expiring with the end of that year and calculated according to the Bengali Calendar would be necessary. The tenancy in this case existed from before the passing of the T. P. Act: *Jamiruddin Saodagar v. Hazi Mal Gani Saodagar*, 62 C.L.J. 201.

Tenancy from year to year.

A valid notice to quit not only determines the original demise but any under-lease which the tenant might have created: *Sheikh Yusuf v. Jyotish Chandra Banerjee*, 59 Cal. 739: 35 C.W.N. 1132: 54 C.L.J. 493.

Under-lease.

Where notice to quit was given by the *shebait* on the footing as if the idols were the sole owners of the premises and it directed that the tenants should vacate the entire premises, while it was found that the idols had only an undivided share in the premises, *held*, that if the notice was sufficient with regard to the whole of the premises it was sufficient with regard to a portion of it even if the property from which ejectment was sought might have been an undivided portion of the said premises: *Sashi Mohon Basak v. Shebait of Sri Sri Lakshmi Narayanjee Thakur*, A.I.R. 1937 Cal. 331.

Notice by shebait on behalf of idol to vacate entire premises, idol having only undivided share: Notice, if sufficient.

Measurements.

90. (1) Subject to the provisions of this section and any contract, a landlord may, by himself or by any person authorized by him in this behalf, enter on and measure all land comprised in his estate or tenure, other than land exempt from the payment of revenue.

Measurements.

Landlord's right to measure land.

(2) A landlord shall not, without the consent of the tenant, or the written permission of the Collector, be entitled to measure land more than once in ten years, except in the following cases (namely):—

- (a) where the area of the tenure or holding is liable by reason of alluvion or diluvion to vary from year to year, and the rent payable depends on the area;
- (b) where the area under cultivation is liable to vary from year to year and the rent payable depends on the area under cultivation;
- (c) where the landlord is a purchaser otherwise than by voluntary transfer and not more than two years have elapsed since the date of his entry under the purchase.

(3) The ten years shall be computed from the date of the last measurement, whether made before or after the commencement of this Act.

Power for Court to order tenant to attend and point out boundaries.

91. (1) Where a landlord desires to measure any land which he is entitled to measure under section 90, the Civil Court may, on the application of the landlord make an order requiring the tenant to attend and point out the boundaries of the land.

(2) If the tenant refuses or neglects to comply with the order, a map or other record of the boundaries and measurements of the land prepared under the direction of the landlord at the time when the tenant was directed to attend, shall be presumed to be correct until the contrary is shown.

Standard of measurement.

92. (1) Every measurement of land made by order of a Civil Court, or of a Revenue-officer, in any suit or proceeding between a landlord and tenant, shall be made by the acre, unless the Court or Revenue-officer directs that it be made by any other specified standard.

(2) If the rights of the parties are regulated by any local measure other than the acre, the acre shall be converted into the local measure for the purposes of the suit or proceeding.

(3) The Local Government may, after local inquiry make rules declaring for any local area the standard or standards of measurement locally in use

in that area; and every declaration so made shall be presumed to be correct until the contrary is shown.

Managers.

Managers.

93. (i) When any dispute exists between co-owners of an estate or tenure or of lands held jointly between two or more estates or tenures as to the management thereof; or

Power to call upon co-owners to show cause why they should not appoint a common manager.

(ii) when, owing to the existence of a large number of small co-sharers in an estate or tenure the tenants or landlords are put to inconvenience and harassment in the payment or receipt of the rent due,

the District Judge may, if it appears to him to be just and convenient, on the application of—

in case (i),—

(a) the Collector, or

(b) any one having an interest in the estate or tenure or in any of the estates or tenures; and

in case (ii),—

(a) more than half the tenants, or

(b) co-sharers holding more than half the aggregate interests in the estate or tenure,

direct notice to be served on all the co-owners or co-sharers calling on them to show cause why they should not appoint a common manager—

in case (i), either for the whole of the estate or tenure or estates or tenures, as the case may be, or for those portions of the estate or tenure or estates or tenures, as the case may be, which are affected by the dispute, and

in case (ii), for the estate or tenure in which the tenants or landlords are put to inconvenience or harassment:

Provided that a co-owner or co-sharer of an estate or tenure or a co-owner of lands held jointly between two or more estates or tenures shall not be entitled to apply under this section unless he is actually in possession of the interest he claims, and, if he is a co-owner or co-sharer of an estate, unless his name and the extent of his interest are registered under the Land Registration Act, 1876.

Notes :—A reference under Or. 46, r. 1 of the C. P. Code cannot be made in a proceeding under sec. 93 of the B. T. Act which is in the nature of an application: *Tarak Gobinda Choudhury v. Tara Gobinda Choudhury*, 38 C.W.N. 499: A.I.R. 1934 Cal. 566: 151 I.C. 721.

Power to order them to appoint a manager, if cause is not shown.

94. If the co-owners fail to show cause as aforesaid within one month after service of a notice under section 93, the District Judge may make an order directing them to appoint a common manager, and a copy of the order shall be served on any co-owner who did not appear before it was made.

Notes : Secs. 94 and 99 :—Where in pursuance of a notice under sec. 94 of the B. T. Act, all the co-owners appoint a common manager of their estate, the District Judge has no jurisdiction thereafter to remove him under sec. 99 of the Act and to restore the management to the co-owners: *Jogendra Nath Mukherjee v. Kshitesh Chandra Roy Chaudhury*, 40 C.W.N. 1312.

Power to appoint manager, if order is not obeyed.

95. If the co-owners do not, within such period, not being less than one month after the making of an order under section 94, as the District Judge may fix in this behalf, or, where the order has been served as directed by that section, within a like period after such service, appoint a common manager and report the appointment for the information of the District Judge, the District Judge may, unless it is shown to his satisfaction that there is a prospect of a satisfactory arrangement being made within a reasonable time,—

- (a) direct that the estate or tenure be managed by the Court of Wards in any case in which the Court of Wards consents to undertake the management thereof; or
- (b) in any case appoint a manager.

1. Notice under sec. 80 : C.P.C. :—Where a common manager of an estate appointed under the B. T. Act, executed, with the sanction of the Court, a mortgage which provided for the repayment of the debt on a specified date and before that date he died and another manager was appointed, and the debt not having been paid the mortgagee, without giving a notice under sec. 80 of the C. P. C., sued the new manager to enforce the mortgage, held, that notice was not necessary under sec. 80, because, assuming that a common manager is a public officer, the suit was not for an act to be done in his official capacity. Failure to pay the debt when due was not an "illegal omission" so as to be an "act" under sec. 3 of the General Clauses Act. Sec. 80 of the C. P. C. may apply although the suit is upon a contract: *Revati Mohon Das v. Jatindra Mohon Ghosh*, 61 I.A. 171: 38 C.W.N. 517 (P.C.) (reversing the decision appealed from, reported in 59 Cal. 961: 55 C.L.J. 8: A.I.R. 1932 Cal. 275).

2. Common Manager, if agent of Proprietor :—A common manager of an estate appointed by the District Judge under sec. 95 of the B. T. Act is not an agent of the proprietors of the estate placed in his charge: *Brindaban Chandra Mitra v. Atul Krishna Basu*, 40 C.W.N. 92: 164 I.C. 728.

Common manager, not agent of proprietor.

96. The Local Government may nominate a person for any local area to manage all estates and tenures within that local area for which it may be necessary to appoint a manager under clause (b) of section 95 and, when any person has been so nominated, no other person shall be appointed manager under that clause by the District Judge unless in the case of any estate the Judge thinks fit to appoint one of the co-owners themselves as manager.

Power to nominate person to act in all cases under clause (b) of section 95.

97. In any case in which the Court of Wards undertakes under section 95 the management of an estate or tenure, so much of the provisions of the Court of Wards Act, 1879, as relates to the management of immovable property shall apply to the management.

The Court of Wards Act, 1879, applicable to management by Court of Wards.

98. (1) A manager appointed under section 95 may, if the District Judge thinks fit, be remunerated by a fixed salary or percentage of the money collected by him as manager, or partly in one way and partly in the other, as the District Judge from time to time directs.

Provisions applicable to manager.

(2) He shall give such security for the proper discharge of his duties as the District Judge directs.

(3) He shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might but for his appointment have exercised, and the co-owners shall not exercise any such power.

(4) He shall deal with and distribute the profits in accordance with the orders of the District Judge.

(5) He shall keep regular accounts, and allow the co-owners or any of them to inspect and take copies of those accounts.

(6) He shall pass his accounts at such period and in such form as the District Judge may direct.

(7) He may make any application which the proprietors could make under section 103.

(8) He shall be removable by the order of the District Judge and not otherwise.

Amendment :—The words “or section 158A” at the end of sub-sec. (7) of this section were omitted by the B. T. (Amendment) Act VI of 1938, sec. 26.

Power to
restore
manage-
ment to
co-owners.

99. When an estate or tenure has been placed under the management of the Court of Wards, or a manager has been appointed for the same under section 95, the District Judge may at any time direct that the management of it be restored to the co-owners if he is satisfied that the management will be conducted by them without inconvenience to the public or injury to private rights.

Notes : Power of District-Judge to remove Common Manager :— A District Judge has no power to remove under this section a Common Manager appointed by proprietors in pursuance of a notice under sec. 94 of the B. T. Act : *Jogendranath Mukherjee v. Kshitesh Chandra Roy Choudhury*, 40 C.W.N. 1312.

Appoint-
ment of
common
agent.

99A. (1) Where two or more persons are joint or co-sharer landlords they may by an instrument in writing appoint a common agent for the whole of their joint property or for any portion thereof to receive on behalf of all of them—

- (a) notices of transfer under sections 12, 13, 15, 17, 18 and 26C, of tenures or holdings or portions or shares thereof held under them within that property,
- (b) the landlord's fee payable under sections 12, 13, 15, 17 and 18,
- (c) the rent deposited in Court under section 61, and
- (d) the notices referred to in sub-section (2) of section 85A and in sub-section (2) of section 88.

(2) (a) The Collector shall, on application by the common agent and on production by him of the instrument of appointment, register the names of the common agent and the landlords appointing him and their addresses and other particulars in the prescribed manner.

(b) The name and address of such common agent shall be entered upon the receipt required under section 56 to be given on the payment of rent for the tenure or holding situated within the area for which he has been appointed under sub-section (1).

Amendment :—The words "*and 26C*" were substituted for the words "*26C, 26F and 48H*" in cl. (a), and the words "*payable under secs. 12, 13, 15, 17 and 18*" were substituted for the words "or the landlord's transfer fee payable under those sections, and" in cl. (b) of this section by the B. T. (Amendment) Act VI of 1938, sec. 27. The word '*and*' at the end of cl. (c), and *new cl. (d)* were inserted by the same Act.

100. (1) The High Court may, from time to time, make rules defining the powers and duties of managers under sections 95 to 99. Power to make rules.

(2) The Board of Revenue may, from time to time, make rules defining the powers and duties of common agents under section 99A.

CHAPTER X.

RECORD-OF-RIGHTS AND SETTLEMENT OF RENTS.

Part 1.—Record-of-rights.

Power to
order
survey and
preparation
of record-
of-rights.

101. (1) The Local Government may, in any case if it thinks fit, make an order directing that a survey be made and a record-of-rights be prepared by a Revenue-officer, in respect of all lands in any local area, estate or tenure or part thereof :

Provided that the provisions of sections 104 to 105A, inclusive, 109C, 109D, 110, 112 and 113 shall not apply in respect of any lands which are held by a non-agriculturist and are not used for purposes connected with agriculture or horticulture.

(2) In particular and without prejudice to the generality of the foregoing power, the Local Government may make such an order in the following cases, namely :—

(a) where—

- (i) the landlord or tenants, or
- (ii) a proportion of not less than one-half of the total number of landlords, or
- (iii) a landlord, or a proportion of the landlords, whose interest, or the aggregate of whose interests, respectively, in the lands of the local area, estate or tenure or part thereof is not less than one-half of the total shares of all the landlords therein, or
- (iv) a proportion of not less one-fourth of the total number of tenants,

applies, or apply, for such an order, depositing or giving security for, such amount for the payment of expenses as the Local Government directs;

(b) where the preparation of such a record is calculated to settle or avert a serious dispute existing or likely to arise between the tenants and their landlords generally;

- (c) where the local area, estate or tenure or the part thereof belongs to, or is managed by, the Government or* the Court of Wards or a manager appointed by the District Judge under section 95;
- (d) where a settlement of land revenue is being or is about to be made in respect of the local area, estate or tenure or of the part thereof.

Explanation 1.—The term “settlement of land revenue”, as used in clause (d), includes a settlement of rents in an estate or tenure which belongs to the Government.

Explanation 2.—A superior landlord may apply for an order under this section, notwithstanding that his estate or part thereof is temporarily leased to a tenure-holder.

(3) A notification in the official Gazette of an order under this section shall be conclusive evidence that the order has been duly made.

(4) The survey shall be made and the record-of-rights prepared in accordance with rules made in this behalf by the Local Government.

102. Where an order is made under section 101, the particulars to be recorded shall be specified in the order, and may include, either without or in addition to other particulars, some or all of the following namely :—

Particulars
to be
recorded.

- (a) the name of each tenant or occupant;
- (b) the class or classes to which each tenant belongs, that is to say, whether he is a tenure-holder, *raiyat* holding at fixed rates, settled *raiyat*, occupancy-*raiyat*, non-occupancy *raiyat* or under-*raiyat*, with or without a right of occupancy and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure;

* The words “by, or on behalf of, the Crown, or is managed by” have been substituted for the words “by, the Government or” in sub-section (2) (c) by the Government of India (Adaptation of Indian Laws) Order, 1937.

- (c) the situation and quantity and one or more of the boundaries of the land held by each tenant or occupier;
- (d) the name of each tenant's landlord;
- (dd) the name of each proprietor in the local area or estate;
- (e) the rent payable at the time the record-of-rights is being prepared;
- (ee) the amount payable in respect of any rights of pasturage, forest-rights, rights over fisheries and the like at the time the record-of-rights is being prepared, the conditions and incidents appertaining to such rights, and if the amount is gradually increasing amount, the time at which, and the increments by which, it increases;
- (f) the mode in which that rent has been fixed—whether by contract, by order of a Court, or otherwise;
- (g) if the rent is a gradually increasing rent, the time at which, and the steps by which, it increases;
- (gg) the rights and obligations of each tenant and landlord in respect of —
 - (i) the use by tenants of water for agricultural purposes, whether obtained from a river, *jhil*, tank or well, or any other source of supply, and
 - (ii) the repair and maintenance of appliances for securing a supply of water for the cultivation of the land held by each tenant, whether or not such appliances be situated within the boundaries of such land;
- (h) the special conditions and incidents, if any, of the tenancy;
- (i) any right of way or other easement attaching to the land for which a record-of-rights is being prepared;
- (j) if the land is claimed to be held rent free—whether or not rent is actually paid, and, if not paid, whether or not the occupant

is entitled to hold the land without payment of rent, and if so entitled, under what authority :

Provided that, if lands are not used for purposes connected with agriculture or horticulture, it shall be sufficient to record that fact together with the prescribed particulars relating to the occupant, the landlord and the tenancy.

1. Clause (dd) : Name of each proprietor :—A Settlement Officer has authority to decide a dispute between two neighbouring proprietors under the provisions of sec. 102 (dd) : *Humayun Raja Choudhury v. Jyotirmoyee Devi*, A.I.R. 1936 Cal. 452.

2. Clause (h) : Special conditions and incidents :—It is within the competence of the Settlement officer to record the acquisition of the right of occupancy by custom by an under-raiyat : *Girish Chandra Dutt v. Girish Chandra Mali*, 54 C.L.J. 68 : A.I.R. 1932 Cal. 6 : 133 I.C. 689.

Settlement Officer can record under-raiyat acquiring occupancy right by custom.

A note in the incidents column of the record-of-rights to show that the tenure contains a certain area which at one time formed a portion of *mokarari* tenure comes under clause (h) and can be ordered : *Trailakya Nath Bhattacharjee v. Bhupendra Nath Mukherjee*, 58 C.L.J. 489 : A.I.R. 1934 Cal. 237 : 150 I.C. 123.

An entry in the record-of-rights of the trees of a holding as the exclusive property of the tenants (*Kul Haq Raiyat*) is an entry of a special incident of the tenancy. This incident is not necessarily one arising out of custom ; it may just as possibly arise from contract. The presumption of correctness is applicable to this entry : *Debi Dayal Singh v. Gango Kuer*, 10 Pat. 311 : A.I.R. 1931 Pat. 209 : 132 I.C. 865.

Trees.

An entry in the "remarks" column of record-of-rights to the effect that the *malik* and the tenant were each entitled to a half share of the trees on the holding is one that the Settlement officer is authorised to make and carries with it the presumption of correctness : *Matukdeo Narain v. Sadhu Soran Ojha*, 134 I.C. 957.

An enquiry in the record-of-rights relating to the right of the tenant to the timber of trees in his holding made under sec. 102 (h) of the Act is evidence that as an incident of his tenancy the plaintiff is entitled to appropriate timber of his trees and this entry must be presumed to be correct until the contrary is shown : *Bidya Prasad Singh v. Surkhor Mahton*, A.I.R. 1931 Pat. 263 : 134 I.C. 638.

102A. The Local Government may, for the purpose of settling or averting disputes existing or likely to arise between landlords, tenants, proprietors, or persons belonging to any of these classes, regarding the use or passage of water,

Power to order survey and preparation of record-of-rights as to water.

make an order directing that a survey be made, and a record-of-rights be prepared, by a Revenue-

officer, in order to ascertain and record the rights and obligations of each tenant and landlord in any local area, estate or tenure or part thereof, in respect of—

- (a) the use by tenants of water for agricultural purposes, whether obtained from a river, *jhil*, tank or well, or any other source of supply; and
- (b) the repair and maintenance of appliances for securing a supply of water for the cultivation of the land held by each tenant, whether or not such appliances be situated within the boundaries of such land.

Power for Revenue-officer to record particulars on application of proprietor, tenure-holder or large proportion of *raiyats*.

103. On the application of one or more of the proprietors or tenure-holders, or of a large proportion of the *raiyats* of an estate or tenure, and on the applicant or applicants depositing or giving security for the required amount for expenses, a Revenue-officer may, subject to and in accordance with rules made in this behalf by the Local Government, ascertain and record all or any of the particulars specified in section 102 with respect to the estate or tenure or any part thereof.

Preliminary publication, amendment and final publication of record-of-rights.

103A. (1) When a draft record-of-rights has been prepared, the Revenue-officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein, or to any omission therefrom, during the period of publication.

(2) When such objections have been considered and disposed of according to such rules as the Local Government may make, and (if a settlement of land-revenue is being or is about to be made) the Settlement Rent-roll has been incorporated with the record under section 104F, sub-section (3), the Revenue-officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner; and the publication shall be conclusive evidence that the record has been duly made under this Chapter.

(3) Separate draft or final records may be published under sub-section (1) or sub-section (2) for different local areas, estates, tenures or parts thereof.

Certificate of, and presumption as to, final

103B. (1) When a record-of-rights has been finally published under section 103A, the Revenue-officer shall, within such time as the Board of Revenue may, by

genral or special order, require, make a certificate stating the fact of such final publication and the date thereof, and shall date and subscribe the same with his name and official title.

publication,
and pre-
sumption
as to cor-
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rights.

(2) The certificate of final publication, or, in the absence of such certificate, a certificate signed by the Collector of any district in which the local area, estate, tenure or part thereof to which the record-of-rights relates is wholly or partly situate, stating that a record-of-rights has been finally published on a specified date, shall be conclusive proof of such publication and of the date thereof.

(3) The Local Government may, by notification, declare, with regard to any specified area, that a record-of-rights has been finally published for every village included in such area; and such notification shall be conclusive proof of such publication.

(4) In any suit or other proceeding in which a record-of-rights prepared and published under this Chapter, or a duly certified copy thereof or extract therefrom, is produced, such record-of-rights shall be presumed to have been finally published, unless such publication is expressly denied.

(5) Every entry in a record-of-rights finally published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

Notes: Sub-sec. (5): 'Shall be presumed to be correct': Entry in Record of Rights based on road cess return.
Rebuttal of presumption:—A very strong case is required to rebut the presumption arising under sec. 103B of the B. T. Act as to correctness of the entry in the record-of-rights that the area of the land leased out under *mokarari* lease was 231 bighas, where such entry is based on a road-cess return filed by or on behalf of the person challenging the entry: *Mahanth Krishna Dayal Gir v. Rani Bhubaneswari Kuer*, 35 C.W.N. 921 (P.C.): 54 C.L.J. 280: A.I.R. 1931, 221: 133 I.C. 734.

The value of the presumption which arises under sec. 103B as to the correctness of the entry in the record-of-rights is not lessened merely by the fact that the plaintiffs not knowing what the entry meant proceeded to attack it on the ground that it wrongly omitted to describe them as possessing occupancy rights: *Doma Singh v. Jaigobind Pande*, A.I.R. 1931 Pat. 361: 135 I.C. 93.

Where there are two records-of-rights prepared at different times, entries in both of them will be presumed to be correct entries of state of things existing at the time when the entries were made and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry

Two Record
of Rights :
Presump-
tion.

in the previous record. On the other hand both records are presumed to be correct at the time they were made and as the latter record records the existing state of things preference must, in the absence of evidence, be given to it: *Matukdeo Narain v. Sadhusaran Ojha*, 134 I.C. 957.

Conflict between old record of rights and recent record of rights, which to prevail.

Person relying on entry need not prove by independent evidence that it is correct. Record of rights and partition record.

In a conflict between the old record-of-rights and a recent record-of rights, the recent record is to be presumed to be correct unless it is proved by evidence to be incorrect, and the burden of proof to show that it is incorrect is upon the party challenging it: *Bhupendra Krishna Ghose v. Abdur Rahaman*, 61 C.L.J. 18.

In view of the provisions of sec. 103 B it cannot be said that the person who relies on that record must prove by independent evidence that it is correct: *Dhanukdhari Singh v. Syed Rafiqul Rahman*, A.I.R. 1933 Pat. 645: 147 I.C. 506.

Even when the question is between the co-sharer landlords of an estate who were parties to a previous partition proceeding, a subsequent settlement record-of-rights showing certain plots as appertaining to some particular *taluqs* within and without the estate must prevail over the earlier partition record showing those plots as appertaining to a certain other *taluq* within the estate, when the said plots were excluded from the partition and kept joint and when there is no other evidence on the point: *Benoda Charan Chakravorty v. Ramani Kishore Chakraverty*, 38 C.W.N. 268.

Settlement records under Reg. VII of 1822, evidentiary value of.

Although settlement records prepared under Reg. VII of 1822 may not have the same evidentiary value as settlement records prepared under the B. T. Act they are evidence against the Government as to the nature of the holding: *Midnapur Zemindary Co. v. Secretary of State for India*, 56 I.A. 388: 34 C.W.N. 1 (P.C.).

Onus.

Where the lands are shown as Debutter in the record-of-rights the onus is on the zemindar to prove that the entry is incorrect. The burden is not discharged by merely proving that the lands in question lie within the estate of the Zemindar: *Chaturbhuj Singh v. Sarada Charan Guha*, 11 Pat. 701: A.I.R. 1933 Pat. 6: 141 I.C. 157.

No presumption backwards.

The rule of evidence is in favour of presuming the continuity of things shown to exist at a particular date. There is no rule of evidence by which one can presume backwards. A record-of-rights which is published only after the disposal of the suit in the first Court, is presumptive evidence of the state of things at the date of its preparation only, and it is not open to the Appellate Court to draw an inference from an entry in it as to possession, that the possession must be referable to a prior date, when the entry does not so refer to a prior date: *Manmatha Nath Halidar v. Girish Chandra Roy*, 38 C.W.N. 763: A.I.R. 1934 Cal. 707: 153 I.C. 170.

Trees.

The provisions of sec. 103B apply to entries in the record-of-rights respecting trees including those on the waste land as an incident of tenancy and the presumption is not rebutted merely from the fact that the ordinary law would give the right in trees to the landlord: *Dulbin Phul Kuar v. Titan Singh*, A.I.R. 1934 Pat. 258: 151 I.C. 614.

An entry in the revisional survey record-of-rights in reference to trees is one which the settlement authorities are authorised to make and therefore it carries with it the presumption of correctness

under sec. 103B: *Jagdeo Singh v. Mahendra Singh*, A.I.R. 1934 Pat. 287: 149 I.C. 149.

Where an entry in the record-of-rights purports to record the basis of the tenant's possession as founded upon a particular document and where the Court finds that the document is false, the presumption attaching to the record-of-rights is rebutted: *Rani Bhuneshwari Koer v. Secretary of State*, A.I.R. 1937 Pat. 374: 169 I.C. 756. Rebuttal of presumption.

The question of the inference to be drawn from the record-of-rights is a question of fact and hence cannot be interfered with in second appeal: *Mohit Tewari v. Ram Narain Dube*, A.I.R. 1938 Pat. 110: 166 I.C. 454. Inference to be drawn from record of rights, if question of fact.

As to conflict of presumptions under this section and sec. 5 (5): *Kanku Sardar v. Shafijuddi*, 55 C.L.J. 569.

Part II.—Settlement of rents, preparation of Settlement Rent-roll, and disposal of objections, in cases where a settlement of land-revenue is being or is about to be made.

104. In every case in which a settlement of land-revenue is being, or about to be made, the Revenue-officer shall, after publication of the draft of the record-of-rights under section 103A, sub-section (1),— Settlement of rents and preparation of Settlement Rent-roll when to be undertaken by Revenue-officer.

(a) settle fair and equitable rents for tenants of every class,

(b) notwithstanding anything contained in section 191, settle a fair and equitable rent for any land in respect of which he has recorded, in pursuance of clause (j) of section 102, that the occupant is not entitled to hold it without payment of rent, and

(c) prepare a Settlement Rent-roll:

Provided that the Revenue-officer shall not settle the rents of tenants of every class in an estate or tenure belonging to the Government, if it does not appear to the Local Government to be expedient that he should do so.

Notes: Settlement of Rent:—Certain permanent lessees under the Government, after creating permanent tenures at fixed rent in their own favour, surrendered their lease and took a fresh lease for a term of 99 years under the Government, held that the Revenue-officer had jurisdiction to settle the rent of the tenures under sec. 104 of the B. T. Act, in the absence of any direction by the Government not to do so: *Rai Satindra Nath Choudhury v. Rai Harendra Nath Chowdhury*, 42 C.W.N. 866: A.I.R. 1938 Cal. 529.

Rents settled by the Settlement-officer under sec. 104 of the B. T. Act are not recoverable as arrears of revenue and are not Rent settled under s. 104

not recover-
able as
arrear of
revenue.

governed by Art. 16 of the Limitation Act: *Secretary of State for India in Council v. Midnapur Zemindary Co., Ltd.*, I.L.R., [1937] 2 Cal. 769 (P.C.). Lands in a permanently settled estate which, after having been submerged by a change in the course of a river, have reappeared in *silu* are not "added lands" within the meaning of sec. 6 of the Bengal Alluvion and Diluvion Act of 1847 and are not assessable as such even though at the time of submergence a reduction of revenue had been made: *Ibid.*

Where a Zemindar grants a *mokarari* lease in respect of lands comprising his *asli* and *diara* lands accreted to his estate at a consolidated rental, the liability of the tenant under the lease is not affected when the revenue authorities settle the fair rent of the *diara* portion only payable by the tenant under sec. 104 of the B. T. Act and Government settles the *diara* lands as a temporarily settled estate with the said Zemindari. When the contract is for one tenancy bearing a consolidated rent covering both lands of the permanently settled estate and *diara* lands, the contract cannot be split up at the instance of the Revenue officer: *Srish Chandra Nandi v. Midnapur Zemindari Company, Ltd.*, I.L.R. [1938] 2 Cal. 41.

In a suit for rent it was found that there was a re-settlement and the annual rent was increased under Part 2 of Chap. X of the Bengal Tenancy Act. It was further found that the tenant did not move the Revenue-officer under sec. 104E or 104G or the Civil Court under sec. 104H. There was a *patta* and *kabuliat* between the landlord and the tenant executed with respect to this *jama* before the passing of the B. T. Act in which there was a stipulation that subject to the contingency as to increase of revenue by Government the rate of rent was fixed; *held*, that in spite of the fact that the tenant did not avail of the remedies provided by secs. 104E, 104G or 104H of the B. T. Act, the landlord was entitled to recover rent only at the rate stipulated in the *patta* and *kabuliyat*: *Sarada Prasad Ghose v. Prafulla Chandra Ghose*, 65 C.L.J. 583; A.I.R. 1938 Cal. 188.

Regulations II of 1793 and VII of 1822—*Rayatari* settlements concluded by the Collector but not confirmed by the Board of Revenue, if binding on Government: *Brojesh Chandra Sen v. Secretary of State for India in Council*, 68 C.L.J. 56.

Procedure
for settle-
ment of
rents and
preparation
of Settle-
ment Rent-
roll under
this Part.

104A. (1) For the purposes of settling rents under this Part and preparing a Settlement Rent-roll, the Revenue-officer may proceed in any one or more of the following ways or partly in one of those ways and partly in another, that is to say,—

(a) if in any case the landlord and tenant agree between themselves as to the amount of the rent fairly and equitably payable, the Revenue-officer shall satisfy himself that the rent so agreed upon is fair and equitable, and if he is so satisfied, but not otherwise, it may be settled and recorded as the fair and equitable rent;



- (b) the Revenue-officer may himself propose what he deems to be the fair and equitable rent, and if the amount so proposed is accepted, either orally or in writing, by the tenant, and if the landlord, after notice to attend, raises no objection, the rent so proposed may be settled and recorded as the fair and equitable rent;
- (c) if the circumstances are, in the opinion of the Revenue-officer, such as to make it practicable to prepare a Table of Rates showing for any local area, estate, tenure or village or part thereof, or for each class of land in any local area, estate, tenure or village or part thereof, the rate or rates of rent fairly and equitably payable by tenure-holders and *rai-yats* and under-*rai-yats* of each class, he may frame a Table of Rates and settle and record all or any of the rents on the basis of such rates in the manner hereinafter described;
- (d) the Revenue-officer may settle all or any of the rents by maintaining the existing rentals recorded in the record-of-rights as published under section 103A, sub-section (1), or by enhancing or reducing such rentals:

Provided that, in making any such settlement, regard shall be had to the principles laid down in sections 6 to 9 (both inclusive), 27 to 36 (both inclusive), 38, 39, 43, 50 to 52 (both inclusive), 180 and 191.

(2) The Settlement Rent-roll shall show the name of each landlord and of each tenant whose rent has been settled, and the amount of each such tenant's rent payable for the area shown against his name.

104B. (1) If a Table of Rates is prepared, it shall specify—

Contents of
Table of
Rates.

- (a) the class or several classes of land for which, having regard to the nature of the soil, situation, means of irrigation, and other like considerations, it is in the opinion of the Revenue-officer necessary or practicable to fix a rate or different rates of rent; and

(b) the rate or rates of rent fairly and payable by tenants holding land of each such class whose rent is liable to alteration.

Local publication of Table.

(2) When the Revenue-officer has prepared the Table of Rates, he shall publish it in the local area, estate, tenure or village to which it relates, in the vernacular language prevailing in the district, and in the prescribed manner.

Revenue-officer to deal with objections.

(3) Any person objecting to any entry in the Table of Rates may present a petition to the Revenue-officer within a period of one month after such publication, and the Revenue-officer shall consider any such objection and may alter or amend the Table.

Table to be submitted to superior Revenue authority.

(4) If no objection is made within the said period of one month, or, where objections are made, after they have been disposed of, the Revenue-officer shall submit his proceedings to the Revenue authority empowered by rule made by the Local Government to confirm the Tables and Rent-rolls prepared under this Part (hereinafter called the "confirming authority"), with a full statement of the grounds of his proposals, and shall forward any petitions of objection which he may have received.

Proceedings of confirming authority.

(5) The confirming authority may confirm a Table submitted under sub-section (4), or may disallow the same, or may amend the same in any manner which appears to it proper, and may allow in whole or in part any objection forwarded therewith or subsequently made or may return the case for further inquiry.

Effect of Table.

(6) When a Table of Rates has been confirmed by the confirming authority, the order confirming it shall be conclusive evidence that the proceedings for the preparation of the Table have been duly conducted in accordance with this Act; and it may be presumed that the rates shown in the Table for tenants of each class, for each class of land, are the fair and equitable rates payable for land of that class within the area to which the Table applies.

Application of Table of Rates.

104C. When a Table of Rates has been confirmed under section 104B, sub-section (5), the Revenue-officer may settle all or any of the rents and prepare the Settlement Rent-roll on the basis of the rates shown in the

Table by calculating the rental of each tenure or each holding of a *raiyat* or under-*raiyat* on the area of such tenure or holding at the said rates :

Provided that the Revenue-officer shall not be bound to apply the said rates in any particular case in which he may consider it unfair or inequitable to do so.

104D. In framing a Table of Rates under section 104B, and in settling rents under section 104C, the Revenue-officer shall be guided by such rules as the Local Government may make in this behalf, and shall, so far as may be, and subject to the proviso to the said section 104C, have regard to the general principles of this Act regulating the enhancement or reduction of rents.

Rules and principles to be followed in framing Table of Rates and settling rents in accordance therewith.

104E. (1) When a Settlement Rent-roll for a local area, estate, tenure or village or part thereof has been prepared, the Revenue-officer shall cause a draft of it to be published in the prescribed manner and for the prescribed period, and shall receive and consider any objections made to any entry therein, or omission therefrom, during the period of publication and shall dispose of such objections according to such rules as the Local Government may make.

Preliminary publication and amendment of Settlement Rent-roll.

(2) The Revenue-officer may, of his own motion or on the application of any party aggrieved, at any time before a Settlement Rent-roll is submitted to the confirming authority under section 104F, revise any rent entered therein :

Provided that no such entry shall be revised until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

104F. (1) When all objections have been disposed of under section 104E, the Revenue-officer shall submit the Settlement Rent-roll to the confirming authority with a full statement of the grounds of his proposals and a summary of the objections (if any) which he has received.

Final revision of Settlement Rent-roll, and incorporation of the same in the record-of-rights.

(2) The confirming authority may sanction the Settlement Rent-roll, with or without amendment, or may return it for revision :

Provided that no entry shall be amended or omission supplied, until reasonable notice has been given

to the parties concerned to appear and be heard in the matter.

(3) After sanction by the confirming authority, the Revenue-officer shall finally frame the Settlement Rent-roll and shall incorporate it with the record-of-rights published in draft under section 103A.

Appeal to,
and revision
by, superior
Revenue
authorities.

104G. (1) An appeal, if presented within two months from the date of the order appealed against, shall lie from every order passed by a Revenue-officer prior to the final publication of the record-of-rights on any objection made under section 104B, sub-section (3), or section 104E; and such appeal shall lie to the prescribed superior Revenue authority.

(2) The Board of Revenue may, in any case under this Part, on application or of its own motion, direct the revision of any record-of-rights, or any portion of a record-of-rights, at any time within two years from the date of the certificate of final publication, but not so as to affect any order passed by a Civil Court under section 104H:

Provided that no such direction shall be made until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

Jurisdiction
of Civil
Courts in
matters
relating to
rent.

104H. (1) Any person aggrieved by an entry of a rent settled in a Settlement Rent-roll prepared under sections 104A to 104F and incorporated in a record-of-rights finally published under section 103A, or by an omission to settle a rent for entry in such Settlement Rent-roll, may institute a suit in the Civil Court which would have jurisdiction to entertain a suit for the possession of the land to which the entry relates or in respect of which the omission was made.

(2) Such suit must be instituted within six months from the date of the certificate of final publication of the record-of-rights, or, if an appeal has been presented to a Revenue authority under section 104G, then within six months from the date of the disposal of such appeal.

(3) Such suit may be instituted on any of the following grounds, and on no others, namely:—

(a) that the land is not liable to the payment of rent;

- (b) that the land, although entered in the record-of-rights as being held rent-free, is liable to the payment of rent;
- (c) that the relation of landlord and tenant does not exist;
- (d) that land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy;
- (e) that the tenancy belongs to a class different from that to which he is shown in the record-of-rights as belonging;
- (f) that the Revenue-officer has not postponed the operation of the settled rent under the provisions of section 110, clause (a), or has wrongly fixed the date from which it is to take effect under that clause;
- (g) that the special conditions and incidents of the tenancy have not been recorded, or have been wrongly recorded;
- (h) that any right of way or other easement attaching to the land has not been recorded, or has been wrongly recorded.

The Secretary of State for India in Council shall not be made a defendant in any such suit unless the Government* is landlord or tenant of the land to which the aforesaid entry relates or in respect of which the aforesaid omission was made.

(4) If it appears to the Court that the entry of rent settled is incorrect, it shall in case (a) or case (c) mentioned in sub-section (3), declare that no rent is payable, and shall in any other case settle a fair rent;

and, in any case referred to in clause (f) or clause (g) of the said sub-section (3), the Court may declare the date from which the rent settled is to take effect, or pass such order relating to the entry as it may think fit.

(5) When the Court has declared under sub-section (4) that no rent is payable, the entry to the

* The words "No such suit shall be brought against the Crown" have been substituted for the words "The Secretary of State for India in Council shall not be made a defendant in any such suits unless the Government" in sub-sec. (3) by the Government of India (Adaptation of Indian Laws) Order, 1937.

contrary effect in the record-of-rights shall be deemed to be cancelled.

(6) In settling a fair rent under sub-section (4) the Court shall be guided by the rents of the other tenures or holdings of the same class comprised in the same Settlement Rent-roll, as settled under secs. 104A to 104F.

(7) Any rent settled by the Court under sub-section (4) shall be deemed to have been duly settled in place of the rent entered in the Settlement Rent-roll.

(8) Save as provided in this section, no suit shall be brought in any Civil Court in respect of the settlement of any rent or the omission to settle any rent under sections 104A to 104F.

(9) When a Civil Court has passed final orders or a decree under this section, it shall notify the same to the Collector of the district.

Headings of Notes.

1. TENANCY NOT ENTERED IN SETTLEMENT RENT-ROLL.
2. SUB-SEC. (3) (d).
3. SUB-SEC. (4).
4. SUB-SEC. (8).
5. SECS. 104H AND 115: PRESUMPTION UNDER SEC. 50.
6. PARTIES.

1. Tenancy not entered in Settlement Rent-Roll:—Sec. 104H has no application to the case of a tenancy which has not been entered in the Settlement Rent-Roll, and it is open to a plaintiff to show that such a tenancy exists and on its basis claim rent from the defendant who is in occupation of the lands of the tenancy: *Anupama Ghose v. Parbati Mistry*, 37 C.W.N. 1081: A.I.R. 1934 Cal. 92: 148 I.C. 70. In such a case the amount of rent settled under sec. 104J is not binding on the plaintiff: *Ibid*.

2. Sub-sec. (3) (d):—Where upon assessment of alluvial lands under Part II of Chapter X of the Bengal Tenancy Act, the grievance of the tenant is that the land has been wrongly recorded as part of a *dearah* estate, he must bring a suit under sec. 104H (3) (d). Unless such a suit is instituted within six months of the final publication of the record-of-rights under sec. 103A, the rent settled is final under sec. 104J, provided the Settlement Officer had jurisdiction. Where settlement of land revenue is being made in an area under Act XXXI of 1858 read with Act IX of 1847, the Settlement Officer has jurisdiction to assess rents: *Bhupati Charan Dey v. Lalit Mohon Banerjee*, 42 C.W.N. 403.

Rent can-
not be

3. Sub-sec. (4):—This sub-section does not empower the Court, on landlord's failure to make out his case for an increase,

to reduce the rents settled by the Settlement Authorities : *Maharaja-dhiraj Kameshwar Singh v. Hemnath Jha*, A.I.R. 1937 Pat. 127 : 167 I.C. 736. reduced under sub-sec. (4).

4. Sub-sec. (8):—A suit for a declaration that certain lands are not salcable in execution of a rent decree and for a perpetual injunction restraining the defendant from putting up the lands to sale in execution is not a suit in respect of any rent or omission to settle any rent under secs. 104A to 104F, and is not therefore barred by sec. 104H (8) : *Kumar Pratiba Nath Roy v. Benode Behari Ghose*, 61 C.L.J. 75 : A.I.R. 1936 Cal. 181.

5: Secs. 104 H and 115 : Presumption under S. 50. :—In proceedings under sec. 104H, Bengal Tenancy Act, a party can claim the benefit of the presumption under sec. 50 although final publication has taken place because it cannot be held that the particulars mentioned in sec. 115 have been completely recorded so long as any dispute remains pending which would immediately affect the record which is being prepared : *Pratap Mondal v. Surpal Sinha*, A.I.R. 1937 Pat. 417 : 170 I.C. 760.

6. Parties:—It is competent for one of several tenants to institute a suit under sec. 104H for the purpose of getting a declaration that he was an occupancy *raiya* and that the entry in a record-of-rights on the basis that he was a tenure-holder was wrong. Consequently the failure to implead in time the legal representatives of one of the plaintiff-respondents in time does not have the effect of rendering the entire appeal bad : *Krishnabandhu Pal v. Brajendra Kumar Saha*, 58 Cal. 1341 : A.I.R. 1932 Cal. 134 : 135 I.C. 797. One of several tenants, if can bring suit under s. 104H.

Where in a suit under sec. 104H of the B. T. Act for a declaration that the defendants were occupancy *raiya*s and not tenure-holders as recorded in the Record-of-Rights but the plaintiff failed to implead certain persons who were recorded as occupancy *raiya*s but who according to the plaintiff were merely under-tenants, held that the so-called under-tenants were necessary parties to the suit and the suit was not maintainable in their absence : *Maharajadhiraj Sir Kameshwar Singh Bahadur v. Bibi Falma*, 17 Pat. 150 : A.I.R. 1938 Pat. 43. Parties to suit under S. 104H.

104J. Subject to the provisions of section 104H, all rents settled under sections 104A to 104F and entered in a record-of-rights finally published under section 103A, or settled under section 104G, shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act. Presump-tions as to rents settled under sections 104A to 104G.

I. Secs. 104 J and III A :—Where the main reliefs prayed for in a suit related to the question of area of the tenancy and the question whether the rent was enhancible it is incumbent upon the plaintiff to proceed under sec. 104H read with sec. 104J if he wants to have those questions settled by the Revenue-Officer reopened and this cannot be allowed to be done by an indirect method of having a declaration under sec. 111A of the B. T. Act : *Mahim Chandra Guha Deb Barman v. Secretary of State*, A.I.R. 1933 Cal. 300 : 166 I.C. 734. Where there was progressive rent for a certain

number of years and a maximum rent was to be enforced for a fixed period and there was no mention about the rent to be paid after the existing settlement, held that the rent could be enhanced at the time of the revision of the settlement: *Ibid*.

2. Tenancy not entered in Settlement Rent-Roll: Settlement of Rent, effect of :—Rent settled under this section in respect of a tenancy which has not been entered in the Settlement Rent-Roll is not binding: *Anupama Ghose v. Parbati Mistry*, 37 C.W.N. 1081. See notes under sec. 104H under the heading "*Tenancy not entered in Settlement Rent-Roll.*"

Part III.—Settlement of rents and decision of disputes, in cases where a settlement of land-revenue is not being or is not about to be made.

Settlement of rents by Revenue-officer in cases where a settlement of land-revenue is not being or is not about to be made.

105. (1) When, in any case in which a settlement of land-revenue is not being made or is not about to be made, either the landlord or the tenant applies, within four months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2), for a settlement of rent, the Revenue-officer shall settle a fair and equitable rent in respect of the land held by the tenant.

Explanation.—A superior landlord may apply for a settlement of rent notwithstanding that his estate or tenure or part thereof has been temporarily leased.

(2) When, in any case in which a settlement of land-revenue is not being made or is not about to be made, the Revenue-officer has recorded, in pursuance of clause (j) of section 102 that the occupant of any land claimed to be held rent-free is not entitled to hold it without payment of rent, and either the landlord or the occupant applies, within four months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2), for a settlement of rent, the Revenue-officer shall settle a fair and equitable rent for the land.

(3) Every application under sub-section (1) or sub-section (2) shall, notwithstanding anything contained in the Court-fees Act, 1870, bear such stamp as the Local Government may prescribe.

(4) In settling rents under this section, the Revenue-officer shall presume, until the contrary is proved, that the existing rent is fair and equitable, and shall have regard to the rules laid down in this Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be.

(5) The Revenue-officer may in any case under this section propose to the parties such rents as he considers fair and equitable; and the rents so proposed, if accepted in writing by the parties, may be recorded as the fair rents, and shall be deemed to have been duly settled under this Act.

(6) Where the parties agree among themselves, by compromise or otherwise, as to the amount of the fair rent, the Revenue-officer shall satisfy himself that the amount agreed upon is fair and equitable, and if so satisfied, but not otherwise, he shall record the amount so agreed upon as the fair and equitable rent. If not so satisfied, he shall himself settle a fair and equitable rent as provided in sub-sections (4) and (5).

(7) Where the lands of the tenancy are included in different local areas for which separate records are framed, the period of limitation specified in sub-section (1) shall begin to run from the date of the certificate of final publication of the last record which contains entries relating to the tenancy.

Headings of Notes.

1. COURT-FEES.
2. ASSESSMENT OF RENT : LIMITATION.
3. RESJUDICATA.
4. SUB-SECTION (4).

I. Court-fees :—The Court-fees to be paid on the applications under section 105 and 105A of the B. T. Act are governed by the Government notification on the subject, namely notification No. 6954 L.R., 21st July 1922, irrespective of the provisions of the Court-fees Act. If an application under Sec. 105 is made in which several parties have or have been joined, a stamp of -/12/- annas should be put for each tenant which means each tenancy. If an issue is raised under section 105A then, in addition to the above stamp, a stamp of the amount of *advalorem* fee chargeable under the Court-fees Act should be put subject to a maximum of Rs. 20/- in respect of each tenancy. The grouping of several tenancies in one application under sections 105 and 105A under the Bengal Government Rule, Part III, Rule 60 (4) is allowed only when a number of tenants under the same landlord in the same village made a joint application for settlement of rent or are joined as defendants in the same proceeding under a similar application by the landlord. This grouping is allowed for the purpose of convenience and not for any fiscal or other purposes. The Government notification is intended to levy a court-fee of -/12/- annas in case of one tenancy irrespective of whether it forms the subject of one application or is one of a group of tenancies covered by one application : *Charusila Dassi v. Muzaffar Sheikh*, 59 Cal. 997 : 55 C.L.J. 303 :

Court fee payable under ss. 105 & 105A.

Grouping of tenancies : Court fee.

Court fee
on memo-
randum of
appeal.

A.I.R. 1932 Cal. 674 : 143 I.C. 37. The same Court-fee is payable also in memorandum of appeals against decisions of Revenue-officers in such proceedings, and in such cases the principle laid down for determining the value of suits and memorandum of appeals under Sec. 7, cl. (ii) of the Court-fees Act should be applied and ten times the difference between the rent claimed and the rent recorded in the record-of-rights should be taken to be the value of the relief sought in respect of each tenancy : *Charusila Dassi v. Abhilas Bauri*, 40 C.W.N. 1149 : A.I.R. 1936 Cal. 804.

2. Assessment of rent : Limitation :—Before the landlord's right to assess rent in respect of land which has been recorded as liable to rent, can be barred, it is necessary that the assertion of a claim of *Niskar* must be made to the knowledge of the landlord twelve years before the proceedings for assessment of rent : *Ananda Lal Chakravarty v. Girindra Nath*, A.I.R. 1936 Cal. 483.

Where the defendant denied in a proceeding under sec. 105, B. T. Act, the plaintiff's right to get any rent from him and the plaintiff brought a suit for assessment of rent more than twelve years after the assertion of hostile right to hold the land rent-free, held that the suit is barred by limitation : *Maharaja Bahadur Ramrano Bijoy Prosad Singh v. Muni Pande*, A.I.R. 1938 Pat. 215 : 175 I.C. 342.

3. Resjudicata :—An *exparte* decision under sec. 105 settling a fair and equitable rent is not *resjudicata* in a subsequent suit by the tenant for declaration of his *niskar* title to the land : *Bhabadeb Chatterjee v. Hemanta Kumari Devi*, 38 C.W.N. 168 : A.I.R. 1934 Cal. 467.

An order of a Revenue-officer assessing fair and equitable rent under sec. 105 until it is set aside by a competent authority has the force of a decree and it operates as *resjudicata* on the question of relationship of landlord and tenant in a subsequent suit for rent : *Kshetralal Singha Rai v. Kazi Mohammad Zikaria*, 60 C.I.J. 13.

The question of the landlord's title or his right to claim *Khas* possession cannot be 'subject' of an application under sec. 105 of the B. T. Act so as to bar a suit in Civil Court relating to those matters : *Syed Md. Gazial Haque Chowdhury v. Nazimennessa*, 35 C.W.N. 765 : A.I.R. 1932 Cal. 22.

A decree of the Court under sec. 105 with regard to one of the two plots held by tenants under one landlord is finding on the tenants and operates as *resjudicata* with regard to the other plot if the parties to the subsequent suit under sec. 105 and the capacity in which they are sued is the same : *Farez Hossein Mir v. Nagendra Kishore Roy Choudhury*, A.I.R. 1930 Cal. 533 : 126 I.C. 560. See notes under s. 107.

4. Sub-sec. (4) :—Sec. 30 does not lay down any particular rule and therefore cl. (4) of sec. 105 does not seem to imply that the Revenue-officer has to follow the provision of sec. 30 as one of the rules laid down for the guidance of the Civil Courts. Meaning of the word "land" in sec. 105 discussed : *Kumar Prativanath Roy v. Bonomali Sarkar*, 35 C.W.N. 212 : A.I.R. 1931 Cal. 565 : 133 I.C. 561.

105A. Where, in any proceedings for the settlement of rent under this Part, any of the following issues arise :—

Decision of questions arising during the course of settlement of rents under this Part.

- (a) whether the land is, or is not, liable to the payment of rent;
- (b) whether the land, although entered in the record-of-rights as being held rent-free, is liable to the payment of rent;
- (c) whether the relation of landlord and tenant exists;
- (d) whether the land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy;
- (e) whether the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging;
- (f) whether the special conditions and incidents of the tenancy, or any right of way or other easement attaching to the land, have not, or has not, been recorded, or have, or has, been wrongly recorded;
- (g) whether the rent payable at the time of final publication of the record-of-rights was correctly entered, and if not, what was the rent payable at that time;

the Revenue-officer shall try and decide such issue and settle the rent under section 105 accordingly :

Provided that the Revenue-officer shall not try any issue under this section, which has been, or is already, directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, and has been tried and decided, or is already being tried, by a Revenue-officer in a suit instituted before him under section 106.

1. Sec. 105 Application dismissed for default : Application under S. 105A, [if can be] proceeded with :—An issue raised under s. 105A is to be tried although an application under s. 105 is withdrawn or allowed to be dismissed for non-prosecution : *Satis Chandra Mukhopadhyaya v. Nabokrishna Roy Chowdhury*, 37 C.W. N. 703. See also *Hrishikesh Chatterjee v. Nabokrishna Roy Chowdhury*, 37 C.W.N. 981 : 58 C.L.J. 232.

2. Court-fees :—See notes under s. 105.

Court-fees
for raising
an issue
under
sec. 105A.

105B. When any issue is raised under section 105A, the party raising it shall pay, in addition to any other court-fees which he may be liable to pay, such court-fees as he would have been liable to pay if he had claimed relief under section 106.

Notes :—*As to Court-fees, see notes under ss. 105, 106.*

Costs not to
be awarded
ordinarily
in proceed-
ings under
section 105
by Revenue-
officer.

Institution
of suit
before a
Revenue-
officer.

105C. Except for reasons to be recorded in writing, no Revenue-officer shall award to any party any portion of his costs in a proceeding under section 105.

106. (1) In proceedings under this Part, a suit may be instituted before a Revenue-officer at any time within four months from the date of the certificate of the final publication of the record-of-rights under sub-section (2) of section 103A of this Act, by presenting a plaint on stamped paper for the decision of any dispute regarding any entry which a Revenue-officer has made in, or any omission which the said officer has made from, the record,

whether such dispute be between landlord and tenant, or between landlords of the same or of neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent-free is properly so held, or as to any other matter;

and the Revenue-officer shall hear and decide the dispute :

Provided that the Revenue-officer may, subject to such rules as the Local Government may make in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial :

Provided also that in any suit under this section the Revenue-officer shall not try any issue which has been, or is already, directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, in proceedings for the settlement of rents under this Part, where such issue has been tried and decided, or is already being tried, by a Revenue-officer under section 105A.

(2) Where the lands to which the dispute relates are situated in local areas for which separate records are framed, the period of limitation specified in sub-section (1) shall begin to run from the date of the certificate of final publication of the last record which contains entries relating to such lands.

Headings of Notes.

1. ABATEMENT OF APPEAL.
2. SECS. 106 AND 109.
3. SCOPE OF SEC. 106.

1. Abatement of Appeal:—A co-sharer landlord's appeal from a decree in a suit under sec. 106 for correction of the record-of-rights abates wholly if one of the other co-sharers, joined as respondent, dies and his heirs are not brought on the record. Or. 41, r. 4 or r. 33, C. P. C. has no application in such a case: *Rai Harendranath Chaudhuri v. Dwijendranath Banerji*, 37 C.W.N. 756: 58 C.L.J. 29.

2. Secs. 106 and 109:—A declaration by itself being outside the scope of a suit under sec. 106 a prayer for such a declaration in a suit under sec. 106 cannot bar a similar prayer in any subsequent suit: *Kumar Birendra Nath Roy Bahadur v. Surendra Nath Tagore*, 58 C.L.J. 120: A.I.R. 1934 Cal. 192.

Plaintiff sued to recover possession of a tank with its banks on declaration of his title alleging that it was part of his *mal* property. The tank and its banks were recorded in the record-of-rights as *nishkar*. Previously plaintiff instituted a suit under s. 106 for correction of the entry alleging that it was his *mal* property, *held* that the decision in the suit was a bar to the present suit: *Chandi Charan Law v. Lal Bewa*, 33 C.W.N. 623: 49 C.L.J. 285.

Sec. 109 would operate as a bar only to the extent that the suit as brought under sec. 106 fell within the purview of the Revenue-officer's functions under that section: *Brojo Mohan Pal v. Darsan Pal*, 34 C.W.N. 47: 49 C.L.J. 294.

3. Scope of S. 106:—In a suit under sec. 106 the Revenue-officer is confined to the question of possession and cannot be asked to adjudicate upon the title of the rival claimants. What the Revenue-officer has to go upon primarily is the question of actual possession in making an entry in the record-of-rights and therefore the scope of the suit or proceeding under sec. 106 to alter an entry so made must also be limited to the question of actual or existing possession: *Jagevanand v. Girijanand*, A.I.R. 1929 Pat. 590: 117 I.C. 644.

107. In all proceedings under section 105, section 105A and section 106, the Revenue-officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure, 1908, for the trial of suits; and his decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties, and, subject to the provisions of sections 108 and 115C shall be final.

Procedure to be adopted by Revenue-officer.

Force of Decree: Shall be final:—Decision of settlement officer settling fair and equitable rent on the basis of *Kabuliyat* rent fixed in contravention of s. 29 is final under s. 107: *Bayatulla Mandal v. Purnendu Narayan Roy Deb Burman*, 37 C.W.N. 744.

Where in a settlement proceedings under sec. 105 the rent has in fact been fixed at a lump sum in respect of each of the holdings by the Settlement Officer, it is, by reason of sec. 107, not open to the plaintiff landlord in a suit to attempt to establish that the rent is other than the rent which the Settlement Officer in fact found to be payable: *Surjo Mohan Thakur v. Chhote Singh*, A.I.R. 1938 Pat. 319: 174 I.C. 447.

A Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under sec. 106 of the B. T. Act. So while the decree in a rent suit ought to be regarded as a valid decree so far as the liability of the parties during the year then in suit is covered, the decision therein that the *bhaoli* rent is payable only in respect of certain areas cannot be treated as *resjudicata* to determine the areas for which such rent shall be payable in subsequent years, where such decision is at variance with an earlier decision under sec. 106 of the Act: *Banke Bihari Lal v. Ram Anugrah Chaudhuri*, A.I.R. 1931 Pat. 215: 136 I.C. 297.

Where the rent of certain land which comprised an undivided share was enhanced under sec. 30 (b) in a suit under old sec. 104 of the B. T. Act, but the question as to a portion of the land being an undivided share was not raised therein, held in a subsequent suit for rent with a claim for enhancement under sec. 30 (b) in respect of the same land, that the previous decision did not operate as *resjudicata*: *Maharaja Bir Bikram Kishore Manikya Bahadur v. Rajjab Ali*, 33 C.W.N. 1156. The decision of a Settlement Officer under the B. T. Act is to have the force of a decree of a Civil Court but that Act says nothing to give the decision of the settlement officer any force beyond what sec. 11 of the C. P. C. properly applied to it would give: *Ibid.* See notes under secs. 105 and 109.

Revision by
Revenue-
officer.

108. Any Revenue-officer especially empowered by the Local Government in this behalf, may, on application or of his own motion, within twelve months from the making of any order or decision under section 105, section 105A, section 106 or section 107, revise the same, whether it was made by himself or by any other Revenue-officer, but not so as to affect any order passed or decree made under section 115C:

Provided that no such order or decision shall be so revised if an appeal from it has been filed under section 115C or until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

Revision : Appeal:—Where proceedings under sec. 108 were commenced by a Settlement Officer on his own initiative against a person who was dead at the time of the initiation of the proceedings and where his heirs were not substituted within 12 months from the order made under secs. 105 and 105A, held that the proceedings were invalid: *Kumar Gocool Chandra Law v. Nistarini Ghose*, 58 Cal. 1013: 35 C.W.N. 336. Whether an appeal lies from an order

under sec. 108 or not the High Court can set aside such an order under sec. 107 of the Government of India Act: *Ibid.*

108A. (*Correction by Revenue-officer of mistakes in record-of-rights.*) Transferred as section 115B, by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 74.

[This old sec. 108A has been transferred as new sec. 115B with some alterations by the B. T. (Amendment) Act IV of 1928].

109. Subject to the provisions of section 115C, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive):

Bar to jurisdiction of Civil Courts.

Provided that nothing contained in this section shall debar a Civil Court from entertaining a suit concerning any matter which—

- (a) was the subject-matter of an application under section 105, or section 105A, or of a suit under section 106, if such application or suit has been dismissed for default or withdrawn, or
- (b) has not been finally adjudicated upon in any such proceeding or suit.

I. Proviso to Sec. 109 :—The proviso to sec. 109 introduced by the Amending Act of 1928 applies to a suit instituted after the said Act came into force even when a proceeding under sec. 105 was commenced and withdrawn before that amendment: *Hingalkumari Dassi v. Satish Chandra Pal*, 41 C.W.N. 737: A.I.R. 1937 Cal. 361 (in which the name of the appellant is *Raja Reshee Case Law*). See also *Administrator-General of Bengal v. Sachindra Kumar Roy*, 65 C.L.J. 90: A.I.R. 1937 Cal. 237; *Kumar Debendra Lal Khan v. Sudharam Roy*, 61 C.L.J. 127: A.I.R. 1936 Cal. 173; *Uday Chandra Chakravorty v. Ambica Chakravarty*, 64 C.L.J. 547: A.I.R. 1937 Cal. 455; *Maharajadhiraj Sir Kameshar Singh v. Hriday Nath Sahoo*, 67 C.L.J. 111: See *Suprabhat Chandra v. Bhupati Bhusan Mandal*, 40 C.W.N. 773: 63 C.L.J. 585, where both the withdrawal and the institution of the suit took place *after* the amendment, and it was held that the suit was maintainable, and the proviso does not affect the right to have a fair rent settled or the right of action in respect thereof but only the question of the Court in which the right is to be enforced and the action brought which is a question of procedure. Where both the withdrawal and the institution of the suit took place *prior* to the amendment it was held that the suit was barred and the proviso to sec. 109 was not applicable: See *Gosla Behari Paramanik v. Nawab Bahadur of Murshidabad*, 35 C.W.N. 1147; *Jnanendra Narayan Bagchi v. Sarada Sundari Dasi*, 57 Cal. 796 and *Kandan Majhi v. Kulada Prasad Ray*, 39 C.W.N. 1040: 62 C.L.J. 347.

Proviso to sec. 109: Retrospectivity.

2. Right of Suit: Resjudicata :—Plaintiff having withdrawn an application for settlement of rent under sec. 105, subsequently sued for enhancement of rent under sec. 30, held that the suit was not barred under sec. 109. See *Srinandan Prosad Singh v. Mithan Mahton*, 14 Pat. 207 : A.I.R. 1935 Pat. 11 : 155 I.C. 28.

Under sec. 109, the failure to press the claim for additional rent for unassessed lands of all the tenancies in proceedings under sec. 105, does not bar landlord from suing the tenant in Civil Court for increasing the rent of tenancies: *Gopal Chandra Chanda v. C. K. Nag & Co. Ltd.*, A.I.R. 1936 Cal. 375.

A suit under sec. 106 for rectification of the entry in the *khatian* does not bear a subsequent suit for declaration of title and possession as the two suits are based entirely on different causes of action: *Nimai Charan Das v. Surendra Nath Ghosh*, A.I.R. 1936 Pat. 606 : 165 I.C. 854.

Where a landlord having applied under sec. 105, for assessment of fair and equitable rent discovered that the Defendant was not in fact a tenant under him and allowed the application dismissed for default and thereafter brought a suit for *khas* possession, held that the suit was not barred under sec. 109: *Syed Md. Gazial Haque Choudhury v. Nazimernnessa*, 35 C.W.N. 765.

Where the subject-matter of the subsequent suit is not the same as the previous application under sec. 105, the suit is not barred under sec. 109: *Hemanta Kumari Debi v. Prasanna Kumar Dutta*, 56 Cal. 584 : A.I.R. 1930 Cal. 32. See also *Abdul Sattar v. Raj Kishore Sah*, A.I.R. 1930 Pat. 161.

109A. (*Appeals from decisions of Revenue-officers.*) Transferred as section 115C, by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 76.

[This old sec. 109A has been transferred as new sec. 115C with some alterations by the B. T. (Amendment) Act IV of 1928].

Part IV.—Supplemental provisions.

109B. In all proceedings under this Chapter, the Revenue-officer may presume that an agreement or compromise made or entered into by any landlord and his tenant is lawful;

but, when the terms of the agreement or compromise are such as might unfairly or inequitably affect the rights of third parties, he shall not give effect to such agreement or compromise until he has given reasonable notice to such third parties to appear and be heard in the matter and unless and until he is satisfied that the statements made by the parties to the agreement or compromise are correct.

Power of Revenue-officer to presume that agreements or compromises are lawful.

109C. (1) Notwithstanding anything contained in section 109B, if in any case while the record is being prepared, the landlord and tenant agree as to the rent which shall be recorded as payable for the tenure or holding,

Power to Revenue-officer to settle rents on agreement.

a Revenue-officer may, if he is satisfied that the rent agreed upon is fair and equitable, but not otherwise, settle such rent as a fair and equitable rent, although the terms of the agreement are such, that, if they were embodied in a contract, they could not be enforced under this Act;

and the provisions of section 113 shall apply to a rent so settled.

(2) A landlord or tenant may appeal to the Special Judge appointed under section 115C, on the ground that the rent settled by the Revenue-officer, under sub-section (1), as a fair and equitable rent, was not agreed to by such landlord or tenant, and on no other ground.

(3) The Board of Revenue may, on application made, or of its own motion in proceedings undertaken, within one year from the date of the order, under sub-section (1), settling a rent as a fair and equitable rent, direct the revision of the rent so settled :

Provided that no such direction shall be made until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

109D. A note of all rents settled under section 105, of all decisions of issues under section 105A or section 106 and of all orders regarding the same on appeal or revision under section 108 or section 115C shall be made in, or appended to, the record-of-rights finally published under sub-section (2) of section 103A, and such note shall be considered as part of the record.

Note of decision on record.

110. When a rent is settled by a Revenue-officer under this Chapter, it shall take effect from the beginning of the agricultural year next after the date of the decision fixing the rent or (if a settlement of land-revenue is being or is about to be made) the date of final publication of the record-of-rights :

Date from which settled rent takes effect.

Provided as follows :—

(a) if the land is comprised in an area, estate or tenure in respect of which a settlement of land-revenue is being or is about to be

made, the rent settled shall, subject to the provisions of *section 191* take effect from the expiration of the period of the current settlement, or from such other date after the expiration of that period as may be fixed by the Revenue-officer;

- (b) if the land is not comprised in an area, estate or tenure as aforesaid, and if the existing rent has been fixed by a contract binding between the parties for an unexpired term of years, the rent settled shall take effect from the expiration of that term, or from such other date after the expiration of that term as may be fixed by the Revenue-officer.

Amendment :—The words "*section 191*" were substituted for the words "*sections 191 and 192*" in the proviso (a) to this section by the B. T. (Amendment) Act VI of 1938, sec. 28.

Stay of proceedings in Civil Court during preparation of record-of-rights.

111. When an order has been made under section 101, directing the preparation of a record-of-rights, then, subject to the provisions of section 104H, a Civil Court shall not,—

- (a) where a settlement of land-revenue is being or is about to be made—until after the final publication of the record-of-rights, and
- (b) where a settlement of land-revenue is not being made or is not about to be made—until four months after the final publication of the record-of-rights,

entertain any application made under section 158, or any suit or application for the alteration of the rent or the determination of the status of any tenant, in the area to which the record-of-rights applies.

Notes :—This section is inapplicable to a proceeding under sec. 26J, and hence a proceeding under that section cannot be stayed under the provisions of this section: *Maharaj Bahadur Singh v. Binode Behari Choudhury*, 63 C.L.J. 152: A.I.R. 1936 Cal. 263.

Limitation of jurisdiction of Civil Courts in matters, other than rent,

111A. No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this Chapter or in respect of the framing, publication, signing or attestation of such a record or of any part of it, or, save as provided in

section 104H, for the alteration of any entry in such a record of a rent settled under sections 104A to 104F : relating to
record-of-
rights.

Provided that any person who is dissatisfied with any entry in, or omission from, a record-of-rights framed in pursuance of an order made under section 101, sub-section (2) clause (d), which concerns a right of which he is in possession, may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877.

I. Right of Suit : Limitation :—A suit for the correction of the record-of-rights is one under the general law, that is, the Specific Relief Act. It does not come under this section or any other section of the B. T. Act, and is not barred by 6 years' limitation: *Dwipendra Nath Chattopadhyaya v. Mahendranath Biswas*, 57 C.L.J. 385: A.I.R. 1933 Cal. 789.

An entry in the record-of-rights neither creates nor takes away any right; having been made on the basis of possession, it remains as a piece of evidence with an evidentiary value, namely, with a presumption of correctness attaching to it. It is not incumbent on a party to avoid the effect of the presumption; a party affected by the presumption can come to Court as and when he finds some injury actually arising from it. And so long as he frames his suit to avert or remedy the injury and is in time for that purpose, the fact that he seeks a declaration as regards incorrectness of the entry, but only as ancillary to the relief as to the injury that he asks for, the suit should not be held to be not in order or out of time simply because it is brought more than six years after the final publication of the record-of-rights: *Ahmed Hossein Bepari v. Digendra Narayan Singha Roy*, 62 Cal. 969: 40 C.W.N. 22 (where the names of the parties in the other analogous appeal are first given: *Rai Keshab Chandra Banerjee Bahadur v. Madan Mohan Poddar*): 61 C.L.J. 519: A.I.R. 1935 Cal. 801; 160 I.C. 96: See also *Rai Kiran Chandra Roy Bahadur v. Tarak Nath Gangopadhyaya*, 40 C.W.N. 566, where it was held that a wrong entry in a record-of-rights itself furnishes a cause of action for bringing a suit for a declaration of his right, irrespective of whether a present injury to his right is threatened or not and if the plaintiff makes the said entry his cause of action he has to institute the suit within six years from the date of final publication but he can wait and if he makes the threatened invasion his cause of action the suit will be in time if brought within six years from that date. The case of *Kumar Nagendra Kishore Roy Choudhury v. Brojendra Kishore Roy Chowdhury*, 36 C.W.N. 783, was distinguished.

Where the cadastral survey has recorded the holding as rent paying but the revisional survey has recorded it as rent-free, and the landlord brings a suit for adjudication that the holding is not rent-free and in the alternative for fixing a fair and equitable rent such action is not for setting aside the record-of-rights in an action for rent and is not barred if not brought within six years from the publication of record-of-rights: *Mohit Tewari v. Ram Narain Dube*, A.I.R. 1938 Pat. 110: 166 I.C. 454.

Suit for declaration that plaintiff is occupancy-*raiyat* and not tenure-holder as wrongly recorded : Limitation 6 years. Stay of suits in which certain issues arise.

2. Proviso :—A suit by a person for a declaration that he is an occupancy-*raiyat* in respect of a certain holding and not a tenure-holder as wrongly recorded in the record-of-rights, is within the proviso to the section and the period of limitation for such a suit is six years as provided for by Art. 120 of the Indian Limitation Act: *Midnapore Zemindary Co. Ltd. v. Secretary of State for India*, 56 I.A. 388: 57 Cal. 118: 34 C.W.N. 1: 51 C.L.J. 1 (P.C.).

111B. (1) Where a record-of-rights has been prepared and finally published in respect of the land in any area in which a settlement of land-revenue is not being made, or is not about to be made, no application or suit affecting such land or any tenant thereof shall, within four months from the date of the certificate of final publication of such record-of-rights, be made or instituted in any Civil Court for the decision of any of the following issues, namely :—

- (a) whether the land is or is not liable to the payment of rent;
- (b) whether the relation of landlord and tenant exists;
- (c) whether the land is part of a particular estate of tenancy; or
- (d) whether there is any special condition or incident of the tenancy, or whether any right of way or other easement attaches to the land.

(2) If, before the final publication of the record-of-rights in such area, a suit involving the decision of any of the issues mentioned in sub-section (1) has been instituted in a Civil Court, the Revenue-officer shall not, in a suit under section 106 or in proceedings under section 105A, try such issue unless in such civil suit such issue is not in fact tried or decided.

(3) Where, in the course of settling fair rents under section 105, the Revenue-officer finds that, by reason of a suit involving the decision of any of the issues mentioned in sub-section (1) having been instituted in a Civil Court before the final publication of the record-of-rights, or before a Revenue-officer under section 106, is unable to settle a fair rent until such issue is decided, the Revenue-officer shall stay the proceedings, for the settlement of a fair rent, pending a final decision on the issue;

and, after the issue has been finally decided, he shall settle a fair rent, as if the record-of-rights had been framed in accordance with such decision.

(4) Where the making of an application or institution of a suit has been delayed owing to the operation of sub-section (1), the period of four months therein mentioned shall be excluded in computing the period of limitation prescribed for such suit or application.

Limitation :—In computing the period of limitation under Art. 120 of the Limitation Act for a suit for declaration that an entry in a record-of-rights is incorrect, the period of four months from the date of the final publication should be deducted. Such a suit is not barred under sec. 42 of the Specific Relief Act: *Bhabadas Mukherjee v. Karpur Kamini Debi*, 42 C.W.N. 96: A.I.R. 1937 Cal. 745 (in which the name of the Appellant is *Sharashijakha Chatterjee*).

112. (1) The Local Government may, on being satisfied that the exercise of the powers hereinafter mentioned is necessary in the interests of public order or of the local welfare,

Power to authorize special settlement in special cases.

or that any landlord is demanding or exacting rents in excess of the rents entered as payable in a record-of-rights prepared under this Chapter, or of the rents payable by reason of enhancements lawfully made after the final publication of such record, invest a Revenue-officer

with the following powers or either of them, namely :—

(a) power to settle all rents;

(b) power, when settling rents, to reduce rents if, in the opinion of the officer, the maintenance of existing rents would on any ground, whether specified in this Act or not, be unfair or inequitable.

(2) The powers given under this section may be made exercisable within a specified area either generally or with reference to specified cases or classes of cases.

(2a) A settlement of rents under this section shall be made in the manner provided by sections 104 to 104J (both inclusive).

(2b) If any rent other than rent for which a decree has already been obtained is in arrear in respect of a tenancy at the time when a settlement of rents is made

under this section, such arrear shall not be recoverable in any Court in so far as it exceeds the amount which would have been due as rent of the tenancy had the settlement or rent taken place at the commencement of the period for which such rent is claimed.

Period for which rents as settled are to remain unaltered.

113. (1) When the rent of a tenure or holding is settled under this Chapter, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure or an occupancy-holding or the holding of an under-*raiyat* having occupancy rights, for fifteen years, and, in the case of a non-occupancy holding or the holding of an under-*raiyat* not having occupancy rights, for five years; and no such rent shall be reduced within the periods aforesaid save on the ground of alteration in the area of the holding or on the ground specified in section 38, clause (a).

(2) The said periods of fifteen years and five years shall be counted from the date on which the rent settled takes effect under this Chapter.

[Note:—See new sec. 75A, inserted by the B. T. (Amendment) Act VI of 1938].

“Holding” in sub-sec. (1) does not include a tenure: Tenure-holder not entitled to reduction of rent under s. 52 when rent settled under Chap. X.

1. Sub-sec. (1): Holding:—The word “holding” in the last part of sub-section (1) of this section does not include a tenure. A tenure-holder, is, therefore, not entitled to reduction of rent under sec. 52 (1) (b) when the rent of the tenure has been settled under Chap. X, for the period mentioned in sec. 113: *Raja Prafulla Nath Tagore v. Mahammad Maliha*, 41 C.W.N. 637: A.I.R. 1937 Cal. 276: 170 I.C. 910.

2. Compromise:—Secs. 29 and 113 have no application where enhancement is made under a compromise whereby the status of the tenancy is raised: *Nagenbala Dasee v. Sridam Mahto*, 59 Cal. 513: A.I.R. 1933 Cal. 69: 141 I.C. 858.

Expenses of proceedings under Chapter.

114. (1) When the preparation of a record-of-rights has been directed or undertaken under this Chapter, in any case except where a settlement of land-revenue is being or is about to be made, the expenses incurred in carrying out the provisions of this Chapter in any local area, estate, tenure or part thereof (including expenses that may be incurred at any time, whether before or after the preparation of the record-of-rights, in the maintenance, repair or restoration of boundary marks and other survey marks erected for the purpose of carrying out the provisions of this Chapter), or such

part of those expenses as the Local Government may direct, shall be defrayed by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments (if any) as the Local Government, having regard to all the circumstances, may determine.

(2) The estimated amount of the expenses likely to be incurred for the maintenance, repair or restoration of boundary marks for a period not exceeding fifteen years, or such part of such amount as the Local Government may direct, may be recovered in advance in the same manner as if such expenses had been already incurred.

(3) The portion of the aforesaid expenses which any person is liable to pay shall be recoverable by the Government as if it were an arrear of land-revenue due in respect of the said local area, estate, tenure or part.

(4) The cost of preparing copies of survey maps and records-of-rights under this Chapter for distribution to landlords and tenants shall be deemed to be part of the expenses incurred in carrying out the provisions of this Chapter.

Explanation.—The word “tenure” in this section includes all revenue-free and rent-free tenures and holdings within a local area, estate or tenure.

Notes : Costs of Settlement operations :—Expenses incurred in carrying out settlement operations in any estate or tenure are to be defrayed by the landlords, tenants, and occupants of the land or tenure. Assessment of costs is not upon land but upon the landlord, tenants and occupants. If before the amounts are collected, a landlord or tenant dies or transfers or abandons his estate or tenancy or any part thereof, recovery is to be made from the person in possession of the former holder's interest : *Secretary of State for India v. Kamala Ranjan Roy*, 64 C.L.J. 126 : A.I.R. 1937 Cal. 94 : 167 I.C. 741. A purchaser, at a sale for arrears of revenue, who is in possession of land appertaining to certain *patnis* which stood annulled by the same is liable for costs of settlement operations : *Ibid*.

115. When the particulars mentioned in section 102, clause (b), have been recorded under this Chapter in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy.

Secs. 50 and 115 :—When a case is governed by the B. T. Act, there cannot be any presumption of fixity of rent from uniform payment for a very long time apart from sec. 50 of the Act : *Srimanta Chattopadhyay v. Khararia Mejozilla Zemindary Syndicate*

Presumption as to fixity of rent not to apply where record-of-rights has been prepared. Demarcation of village boundaries.

Presump-
tion of
fixity of
rent, if can
be drawn
apart from
sec. 50.

Ltd., 55 C.L.J. 91: A.I.R. 1932 Cal. 632. See, however, *Harey Sinha Chowdhury v. Saradindu Narayan Ray*, 61 Cal. 821: 38 C.W.N. 645: A.I.R. 1934 Cal. 642, where it has been held that sec. 115 only excludes the presumption under sec. 50, but does not exclude other proofs of fixity of rent and does not exclude consideration, for that purpose, of *dakhilas* showing payment at a uniform rate.

Demarca-
tion of
village
boundaries.

115A. In the demarcation of village boundaries for the purpose of making a survey and preparing a record-of-rights under this Chapter, a Revenue-officer shall so far as is possible, and subject to the provisions of the Bengal Survey Act, 1875, preserve, as the unit of survey and record, the area contained within the exterior boundaries of the village maps of the revenue survey, or other survey, if any, adopted under clause (19) (b) of section 3 as defining villages;

and, where village maps prepared at such revenue or other survey exist, he shall not, without the sanction of the Board of Revenue, adopt any other area as such unit.

Correc-
tion by
Revenue-
officer
of mistakes
in record-
of-rights.

115B. Any Revenue-officer specially empowered by the Local Government in this behalf may, on application or of his own motion, within two years from the date of the certificate of the final publication of the record-of-rights under sub-section (2) of section 103A, correct any entry in such record-of-rights which he is satisfied has been made owing to a *bona fide* mistake:

Provided that no such correction shall be made if an appeal affecting such entry has been filed under section 115C or until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

[Note :—The old sec. 108A has been transferred as this new section 115B by the B. T. (Amendment) Act IV of 1928].

Bonafide mistake:—Sec. 115B does not cover decisions of disputes such as can be obtained under sec. 106. It extends to reconsideration of the decision on merits but only with a view to finding out whether there was a *bonafide* mistake or not, such mistakes for example, being cases where the conclusion does not follow from the premises or one part of the record contradicts another. A conclusion arrived at on a proper consideration of the evidence, however, erroneous, is not a *bonafide* mistake within the meaning of the section: *Ayesha Khatun v. Commissioners for the Port of Chittagong*, I.L.R. [1938] 1 Cal. 413: 41 C.W.N. 1332: A.I.R. 1938 Cal. 31; 174 I.C. 113.

115C. (1) The Local Government shall appoint one or more persons to be a Special Judge or Special Judges for the purpose of hearing appeals from the decisions of Revenue-officers under sections 105 to 108 (both inclusive) and section 115B.

Appeals from decisions of Revenue-officers.

(2) An appeal shall lie to the Special Judge from the decisions of a Revenue-officer under sections 105 to 108, both inclusive, and section 115B, and the provisions of the Code of Civil Procedure, 1908, relating to appeals shall, as nearly as may be, apply to all such appeals.

(3) Subject to the provisions of sections 100 to 103, section 107, section 108 and section 144 of, and Order XLII in Schedule I to the Code of Civil Procedure, 1908, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of section 100 of that Code :

Provided that, if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding, but in so doing shall be guided by the rents of the other tenures or holdings of the same class comprised in the same record as ascertained under section 102 or settled under section 105 or section 108.

[**Note** :—The old sec. 109A has been transferred as the new sec. 115C by the B. T. (Amendment) Act IV of 1928].

Sub-sec. (3) : Appeals : Second appeal : Revision :—A Special Judge to whom an appeal is preferred against decision of a Revenue-officer in proceedings under sec. 105 of the Bengal Tenancy Act, has power to reject the memorandum of appeal for failure of the appellant to supply the requisite additional court-fee which he demands. An order of the special Judge so rejecting a memorandum of appeal is not appealable to the High Court, though the High Court can in special circumstances treat the appeal as memorandum of revision under sec. 115, C. P. Code. But an appeal arising out of a proceeding under sec. 105 of the Bengal Tenancy Act lies to the High Court against the decision of the Special Judge when there has been an investigation and determination by him of any of the questions under sec. 105A of the Bengal Tenancy Act: *Charusila Dasi v. Abilash Bauri*, 40 C.W.N. 1149: A.I.R. 1936 Cal. 804.

Appeal, if lies against order rejecting memo of appeal: Revision.

An appeal from a decree rejecting a claim for additional rent for additional area is not barred under sec. 109A (now sec. 115C) as there

Appeal lies against

decision
in a case
claiming
additional
rent.

*Secs. 115C
and 180A.*

is no question of settlement of fair and equitable rent : *Nirodbashini Mitra v. Sital Chandra Ghatak*, 51 C.L.J. 569 : A.I.R. 1930 Cal. 577.

Second Appeal :—No second appeal lies to the High Court under this section against the decision of a Special Judge settling rent under sec. 180A. A mere decision of the question for how many years *utbandi* tenants had been occupancy-raiyats will not make the decision appealable : *Badri Narayan Chetlangiya v. Abdul Mandal*, 60 C.L.J. 116 : A.I.R. 1935 Cal. 97 : 154 I.C. 466.

*Secs. 115C
and 180A
(15).*

When the decision of the Special Judge is only about the amount of the rent settled, and there is no dispute about the status of the tenants or about the enhancibility or otherwise of the rent or as regards the area for which the rent is to be assessed, a second appeal is barred under sec. 180A (15) read with this section : *Srish Chandra Pal Choudhury v. Rajani Kanta Biswas*, 60 C.L.J. 458 : A.I.R. 1935 Cal. 278 : 155 I.C. 812 : *see notes under sec. 180A.*

CHAPTER XI.

NON-ACCRUAL OF OCCUPANCY AND NON-OCCUPANCY RIGHTS AND RECORD OF PROPRIETORS' PRIVATE LANDS.

116. Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to, lands acquired under the Land Acquisition Act, 1894, for the Government* or for any local authority or for a Railway Company, or lands belonging to the Government* within a Cantonment, while such lands remained the property of the Government,* or of any local authority or Railway Company, or lands owned by the Government* or by any local authority which are used for any public work, such as a road, canal or embankment, or are required for the repair or maintenance of the same, or to a proprietor's private lands known as *khamar*, *nij*, *nij-jot*, *ziraat*, *sir* or *khamat* where any such land is held under a lease for a term of years or under a lease from year to year.

Saving as to certain lands.

1. Presumption :—There is a presumption under this section that land is not a proprietor's private land until the contrary is shown. An entry in the survey *khatian* as "proprietor's *bakasht*" in respect of land in Darbhanga district negatives the claim that land is proprietor's private land. An admission by the tenant in the lease that land is *khudkash* of the proprietor cannot be accepted as clear admission that it is proprietor's private land. The term "*ziraat*" in the same district is applied to all lands in the possession whether or not it is truly *ziraat* or private land within the meaning of the statute: *Radha Krishna Thakurji v. Raghunandan Sinha*, 62 I.A. 64: 14 Pat. 335: 39 C.W.N. 547: 61 C.L.J. 216 (P.C.). When the entry as to certain land in the record-of-rights is that it is in the possession of the tenant no presumption can arise that it is *ziraat* of the proprietor: *Kishun Prosad Pandey v. Durga Prasad Thakur*, 35 C.W.N. 1217 (P.C.): A.I.R. 1931 231.

Admission.

Ziraat, meaning of, in Darbhanga District.

2. Occupancy Right :—There is no absolute bar to the accrual of occupancy right in *ziraat* lands (proprietor's private lands) and the only bar to the acquisition of such right is under circumstances contained under sec. 116, namely, when it is held under a lease for a term of years or under a lease from year to year. *Tengaroo Sukul v. Chattu Bhar*, 9 Pat. 347: 118 I.C. 316: A.I.R. 1929 Pat. 460.

A tenant taking an oral lease of *zirat* land for a definite period of one year cannot acquire occupancy right in view of the provisions "A term of years" in sec. 116 meaning of.

* The word 'Crown' has been substituted for the word 'Government' by the Government of India (Adaptation of Indian Laws) Order, 1937.

of sec. 116 of the Act. The word "a term of years" in sec. 116 of the Act is a generic term. It means merely a period of time which can be measured in years. The true meaning of the expression is that it must be a lease for a definite period to come to end at a definite time. A lease for a year certain is not the same as a lease from year to year; when the former expression is used the tenant becomes a trespasser when the lease comes to an end, whereas when the latter expression is used, if he does not receive notice from the landlord to quit his tenancy at the end of the year then his tenancy shall extend for another period of one year: *Umashankar Prasad v. Kunj Behari Thakur*, 17 Pat. 218.

Power for Government to order survey and record of proprietor's private lands.

117. The Local Government may, from time to time, make an order directing a Revenue-officer to make a survey and record of all the lands in a specified local area which are a proprietor's private lands within the meaning of section 116.

Power for Revenue-officer to record private land on application of proprietor or tenant.

118. In the case of any land alleged to be a proprietor's private land, on the application of the proprietor or of any tenant of the land, and on his depositing the required amount for expenses, a Revenue-officer may, subject to, and in accordance with, rules made in this behalf by the Local Government, ascertain and record whether the land is or is not a proprietor's private land.

Procedure for recording private land.

119. When a Revenue-officer proceeds under section 117 or 118 the provisions of sections 103A, 103B, 106, 107, 108, 109 and 115C shall apply.

Rules for determination of proprietor's private land.

120. (1) The Revenue-officer shall record as a proprietor's private land—

- (a) land which is proved to have been cultivated as *khamar*, *ziráat*, *sir*, *nij*, *nij-jot* or *khamat* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and
- (b) cultivated land which is recognized by village usage as proprietor's *khamar*, *ziráat*, *sir*, *nij*, *nij-jot* or *khamat*.

(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and

to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

(2a) Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue-officer shall not record any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2).

(3) If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue-officers.

Notes : Evidence of land being Proprietor's khamar : Standard of Proof :— Under this section which lays down the standard of proof necessary when a proprietor claims certain lands as his *khamar* lands, if *khas* cultivation by the proprietor for twelve continuous years before the passing of the Act is proved, that is sufficient. If village usage recognises a parcel of land to be the *malik's khamar*, that too would be enough. If it has been let out as *khamar* before 2nd March, 1883, that would be enough. Even admissions and assertions made after 2nd March, 1883, or after the passing of the Act, and in fact any piece of evidence relevant, under the Evidence Act would be admissible to prove that it is *khamar*, and will have to be weighed by the court. *Uma Charan Biswas v. Debendra Nath Podder*, 40 C.W.N. 119: 164 I.C. 1001. See notes under sec. 116 under the heading No. I "Presumption"

CHAPTER XII.

Distrain.

121 to 142. *Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 87.*

CHAPTER XIII.

JUDICIAL PROCEDURE.

Power to
modify Civil
Procedure
Code in its
application
to landlord
and tenant
suits.

143. (1) The High Court may, from time to time, with the approval of the Governor General in Council,* make rules, consistent with this Act, declaring that any portions of the Code of Civil Procedure, 1908, shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

(2) Subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure, 1908, shall apply to all such suits.

Jurisdiction
in proceed-
ings under
Act.

144. (1) The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, 1908, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought and no suit between landlord and tenant as such shall be instituted in any Court other than a Court within the local jurisdiction of which the lands of the tenure or holding, as the case may be, are wholly or partly situated.

(2) A landlord may institute one suit in respect of the rent of more than one tenancy, if the tenancies, in respect of the rent of which the suit is brought, are

* The words "Provincial Government" have been substituted for the words "Governor General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

held in similar right and equal status by the same tenant under him :

Provided that—

- (i) the claim in respect of each tenancy shall be stated separately in the plaint;
- (ii) separate decrees shall be made in respect of each tenancy;
- (iii) the costs of the suit shall be apportioned by the Court in respect of each tenancy; and
- (iv) separate court-fees shall be levied on the claim on account of each tenancy.

(3) When under this Act a Civil Court is authorized to make an order on the application of a landlord or a tenant, the application shall be made to the Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application is brought.

Rent suit where to be brought :—Where one suit is brought in respect of the rent of more than one tenancy as contemplated by sec. 144 of the Bengal Tenancy Act, the lands of each of such tenancies must lie wholly or in part within the local jurisdiction of the Court in which the suit is brought. If in such a suit a decree is passed for rent in respect of a tenancy which is within such local jurisdiction and of a tenancy which is outside, the decree in respect of the tenancy within the jurisdiction is valid but the other decree is liable to be set aside: *Kumar Sarat Kumar Roy v. Dharmadas Bhattacharjee*, 42 C.W.N. 375 : A.I.R. 1937 Cal. 738.

145. Every *naib* or *gumashta* of a landlord empowered in this behalf by a written authority under the hand of the landlord, shall, for the purposes of every such suit or application, be deemed to be the recognized agent of the landlord within the meaning of the Code of Civil Procedure, 1908, notwithstanding that the landlord may reside within the local limits of the jurisdiction of the Court in which the suit is to be instituted or is pending, or in which the application is made :

Naibs or gumasthas to be recognized agents

Provided that notwithstanding anything contained in the Code of Civil Procedure, 1908, every such *naib* or *gomashta* may verify the pleadings on behalf of the landlord and shall not be required to obtain the permission of the Court for the purpose of such verification.

Power of "Gumashta" :—The *gumashta* or *patwari* of a landlord has no authority by taking rent from a transferee to create relationship of landlord and tenant between the master and such a

transferee: *Ratandeo Narayan v. Jamuna Prasad Tewary*, A.I.R. 1937 Pat. 147 : 169 I.C. 304

Special register of suits.

146. The particulars mentioned in rule 1 of Order VII in Schedule I to the Code of Civil Procedure, 1908, shall, in the case of such suits, instead of being, entered in the register of civil suits prescribed by Rule 2 of Order IV in Schedule I to the said Code, be entered in a special register to be kept by each Civil Court, in such form as the Local Government may, from time to time, prescribe in this behalf.

Joint and several liability for rent of co-sharer tenants in a tenure or holding.

146A. (1) Notwithstanding anything contained in the Indian Contract Act, 1872, all co-sharer tenants in a tenure or holding and their successors in interest shall be liable to the landlord jointly and severally for the rent payable to such landlord on account of the tenure or holding, whether such rent has accrued during the time of their own occupation or during the time of the occupation of their predecessors in interest.

(2) Notwithstanding anything contained elsewhere in this Act or in any other law a decree for arrears of rent of a tenure or holding and a sale in execution of such decree shall be valid against all the co-tenants, whether they have been made parties defendant to the suit or not and against the holding in the manner provided in Chapter XIV, if the defendants to the suit represented the entire body of co-sharer tenants in the tenure or holding for the rent of which the suit was brought.

(3) The entire body of co-sharer tenants in a tenure or holding shall for the purposes of sub-section (2) be deemed to be represented by the defendants to the suit if such defendants include—

- (i) all the co-sharer tenants in the tenure or holding whose homestead are situated in the village in which the tenure or holding is situated;
- (ii) such of the co-sharer tenants in the tenure or holding as have, at any time during the three years previous to that for the rent of which the suit is brought, made any payment of rent for the tenure or holding;
- (iii) such co-sharer tenants who having purchased an interest in the tenure or holding, have given notice of the purchase

under sub-section (3) of section 12, or section 26-C, as the case may be, or who having succeeded to an interest by inheritance have given notice of their succession under section 15; and

(iv) all other co-sharer tenants in the tenure or holding whose names are entered in the landlord's rent-roll.

Amendment :—The words “or section 26E” in cl. (iii) of sub-sec. (3) were omitted by the B. T. (Amendment) Act VI of 1938, s. 29.

Headings of Notes

1. SUB-SEC. (3) : “DEEMED TO BE REPRESENTED”.
2. SUB-SEC. (3), CL. (1) : HOMESTEAD.
3. MISCELLANEOUS.

1. Sub-sec. (3) : “Deemed to be represented” :—Under sub-sec. (3) of this section the entire body of co-sharer tenants is to include the names of every one of the four clauses enumerated in clauses (i) to (iv) of that sub-section and the landlord in order to get a rent decree must implead as defendants every co-sharer tenant, who comes under the description in any of the four clauses. In other words if any co-sharer tenant comes under any of the four classes and he is not sued in the rent suit, then the decree will not be a rent decree : *Amulya Charan Misra v. Pran Krishna Adhikary*, 42 C.W.N. 755 : A.I.R. 1938 Cal. 531. See also *Chandra Kanta Bal Munshi v. Saharali Sheik*, 67 C.L.J. 467 in which it has been held that the clauses in sub-section 3 of sec. 146A cannot be read disjunctively. This case dissented from the decisions of *Maharaja Sashi Kanta Acharjee Bahadur v. Lechoo Sheikh*, 61 C.L.J. 548 : A.I.R. 1936 Cal. 30, and *Raja Nagendra Nath Sinha Roy v. Niranjana Patra*, I.L.R. [1938] 1 Cal. 164 : 41 C.W.N. 1173, where it was held that if the defendants in rent suit fulfil the requirements of any of the four clauses of sub-section (3) of sec. 146A they would be taken to be representing the entire body of co-sharer tenants in the tenure or holding. In the case of *Ayesha Khatun v. Hosen Molla*, 41 C.W.N. 85 the decision in *Maharaja Sashi Kanta's case*, 61 C.L.J. 548 was affirmed, and it was held that the word “and” occurring in clauses (iii) and (iv) of sub-section 3 of sec. 146-A is to be read in a disjunctive way, i.e., if the defendants in a rent suit fulfil any of the conditions enumerated in clauses (i), (ii), (iii), (iv) of that sub-section they need not fulfil all the conditions, but would still be deemed to represent the tenure or holding. It was further held in this case, 41 C.W.N. 85 that the conditions laid down in s. 146A (3) are not the only conditions which would give to the defendants in that suit a representative character. There may be other circumstances from which a Court would be entitled to come to decide as a question of fact that the defendants in the rent suit represented their co-sharers not made parties to the rent suit. To take an illustration if all the co-sharer tenure-holders agree that some of them should be their

Conflict of case law.

representatives in their dealings with the landlord and if that fact is communicated to the landlord the landlord will be entitled to institute a suit against those persons who have been held out to him as representing the tenure.

2. Sub-sec. (3) cl. (i) : Homestead :—The word "homestead" in this sub-section means the actual habitation of the tenant and does not include a bare piece of land with no structures thereon, which has been used as a dwelling house years before: *Ayesha Khatun v. Hosen Molla*, 41 C.W.N. 85.

3. Miscellaneous :—If the transferee of a non-transferable occupancy holding again transfers his entire interest to another person then the landlord can recognise the second transferee as tenant but not the prior transferee who had no concern with the land. Therefore a suit by the landlord against the prior transferee cannot be a suit for rent against the person representing the holding: *Mahadev Pal v. Shibu Charan Pal*, 62 C.L.J. 147.

Procedure
in rent suit
against
co-sharer
tenants in
a tenure or
holding.

146B. (1) Notwithstanding anything contained in the Indian Limitation Act, 1908, any person who claims that he should have been joined as a co-sharer tenant defendant in a suit for the recovery of arrears of rent due in respect of a tenure or holding may at any time before the hearing of the suit has been commenced apply to be made a party defendant to the suit, and the Court shall consider his claim, and if it finds that he should have been so joined shall join him as a party defendant:

Provided that if any such person at any time in the course of such suit pays into Court the full amount of the claim together with such costs as the Court may direct, the suit shall be dismissed and in any such case the provisions of section 171 shall apply.

(2) The provisions of sub-sections (2) and (3) of section 146A shall, so far as may be, apply in the case of a co-sharer tenant joined as a defendant under sub-section (1) of this section.

Successive
rent-suits.

147. (1) Subject to the provisions of rule 1 of Order XXIII in Schedule I to the Code of Civil Procedure, 1908, where a landlord has instituted a suit against a *raiyat* for the recovery of any rent of his holding, the landlord shall not institute another suit against him for the recovery of any rent of that holding until after *nine* months from the date of the institution of the previous suit:

(2) *Nothing in sub-section (1) nor in rule 2 of Order II in Schedule I to the Code of Civil Procedure, 1908, shall be deemed to prevent a landlord instituting*

a suit for a portion of the arrears of rent in respect of a holding, provided that—

(a) the claim in such suit shall be for the rent or the balance of the rent due for a complete agricultural year or years; and

(b) the plaint shall contain in addition to the particulars specified in clause (b) of section 148, the total claim which might have been made on the date of the institution of the suit, and the period to which the said total claim relates.

(3) Where a subsequent suit for rent is instituted by a co-sharer landlord and has been consolidated with a previous suit for rent under the provisions of sub-section (4) of section 148A, the date of the institution of the subsequent suit shall, for the purposes of this section, be deemed to be the date of the suit which was first instituted and with which it was consolidated.

Amendment :—Sec. 147 was renumbered as sub-sec. (1) of sec. 147 and the word 'nine' was substituted for the word "three" in that sub-section by the B. T. (Amendment) Act IV of 1938, sec. 30. The proviso to sec. 147 was omitted, and to the said sub-sec. as renumbered and amended sub-secs. (2) and (3) were added by the same Act. The amendment was opposed on the ground that as revenue is to be paid at the end of every three months so the landlord should not be debarred from realising rent by rent suit at the end of every three months from the tenants. In the Bill it was proposed to substitute the word "twelve" for the word "three". By an amendment in the Assembly the word "eleven" was substituted for the word "three". In the Council the word "*nine*" was substituted for the word "three" and the said amendment was agreed to by the Assembly.

147A. (1) Notwithstanding anything contained in rule 3 in Order XXIII in Schedule I to the Code of Civil Procedure, 1908, if any suit between landlord and tenant as such is wholly or partly adjusted by agreement or compromise, the Court shall not order an agreement or compromise to be recorded and shall not pass a decree in accordance with such agreement or compromise unless it is satisfied, for reasons to be recorded in writing, that the terms of such agreement or compromise are such that, if embodied in a contract, they could be enforced under this Act :

Compromise
of suits
between
landlord
and tenant.

Provided that, in the case of a suit instituted by the landlord to enhance the rent, the enhancement, if any agreed upon may be decreed if the Court be satisfied, for reasons to be recorded in writing, that such

enhancement is fair and equitable and in accordance with the rules laid down in this Act for the guidance of Courts in increasing rents.

(2) Where the terms of any agreement or compromise are such as might unfairly or inequitably affect the rights of third parties, the Court shall not pass a decree in accordance with such agreement or compromise, unless and until it is satisfied by evidence that the statements made by the parties thereto are correct.

Illustration.—A, a proprietor, agrees that B, his tenant shall be recorded as an occupancy-*raiyat*; this affects the rights of the tenants of B. The Court must, under this sub-section, inquire whether B is a tenure-holder or a *raiyat* as defined in section 5. If the Court finds on the evidence that B is a *raiyat*, it may pass a decree in accordance with the agreement, but shall not do so if it finds that B is a tenure-holder.

Compromise decree in contravention of sec. 29, if nullity :—A compromise decree passed in contravention of the provisions of sec. 29 cannot be treated in a subsequent suit between the same parties as without jurisdiction and a nullity but is operative and binding until vacated by appropriate proceedings: *Girish Chandra Singha v. Mahomed Rausan Mian*, A.I.R. 1933 Cal. 66: 141 I.C. 849. See also *Bhajan Kahar v. Jogesh Prasad Singh*, A.I.R. 1935 Pat. 358: 156 I.C. 123. See also *Lokigope v. Ramanandan Prasad Singh*, 8 Pat. 372: A.I.R. 1929 Pat. 287: 118 I.C. 722. Compromise is binding if it settles *bona fide* dispute: *Ibid.* See also *Askaran Baid v. Deo Lal Singh*, A.I.R. 1929 Pat. 568: 118 I.C. 723.

Regard to
be had by
Civil Courts
to entries
in record-
of-rights.

147B. In all areas for which a record-of-rights has been prepared and finally published under sub-section (2) of section 103A, a Civil Court shall, in all suits between landlord and tenant as such, have regard to the entries in such record-of-rights relating to the subject-matter in dispute which may be produced before it, unless such entries have been proved by evidence to be incorrect; and, when a Civil Court passes a decree at variance with such entries, it shall record its reasons for so doing.

Procedure
in rent
suits.

148. The following rules shall apply to suits for the recovery of rent:—

(a) sections 68 to 72 of the Code of Civil Procedure, 1908, and rules 1 to 13 of Order XI, rule 83 of Order XXI and rule 2 of Order XLVIII in Schedule I to the said Code, and Schedule III to the said Code shall not apply to any such suit;

- (b) the plaint shall contain, in addition to the particulars specified in rules 1, 2, 4, 5 and 6 and sub-rule (2) of rule 9 of Order VII in Schedule I to the Code of Civil Procedure, 1908, a statement of the situation, designation, extent and boundaries of the land held by the tenant; or, where the plaintiff is unable to give the extent or boundaries in lieu thereof a description sufficient for *identification*. *The plaint* shall further contain a statement as to whether a record-of-rights has been prepared and finally published in respect of such land;
- (c) where the suit is for the rent of land situated within an area for which a record-of-rights has been finally published, the plaint shall contain a statement of the serial number or numbers borne by the tenancy in the record-of-rights, and of the area and rental of the tenancy according to such record, unless the Court is satisfied, for reasons to be recorded in writing, that the plaintiff was prevented by any sufficient cause from furnishing such statement:

Provided that, in all cases in which the Court admits a plaint which does not contain such statement, the Court shall, and in any other case in which it sees fit the Court may require the Collector to supply, without payment of fee, a verified or certified copy of, or extract from, the record-of-rights relating to the tenancy.

Provided also that when the plaint contains such a statement, no statement of the situation, designation, extent and boundaries of the land held by the tenant as referred to in clause (b) shall be required except in so far as may be necessary for the purposes of clause (d);

- (d) where any changes have occurred in the area, survey plots, or rent of the tenancy since the record-of-rights was finally published, the plaint shall further contain a state-

ment shewing the particulars of such changes;

- (e) the summons shall be for the final disposal of the suit, unless the Court is of opinion that the summons should be for the settlement of issues only;
- (f) the service of the summons may, if the High Court by rule, either generally, or specially for any local area, so directs, be effected either in addition to, or in substitution for, any other mode of service, by forwarding the summons by post in a letter addressed to the defendant and registered under Part III of the Indian Post Office Act, 1866 :

when a summons is so forwarded in a letter, and it is proved that the letter was duly posted and registered the Court may presume that the summons has been duly served;

- (g) notwithstanding anything contained in the Code of Civil Procedure, 1908, or any rules made thereunder the plaintiff in a suit for recovery of arrear of rent shall not be required to supply any identifier for the purpose of serving the summons on the defendant or on any witness, and the serving officer shall serve the summons after due inquiry as to the identity of the person on whom, or the house or property where, the summons is served. The serving officer shall serve the summons in the presence of at least two persons and he shall, whenever possible, require the signature of those persons to be endorsed on the original summons and, where he is unable to serve the summons, he shall, whenever possible, require the signatures of two persons of the locality to be so endorsed;
- (h) notwithstanding anything contained in rule 4 (3) of Order XXXII in Schedule I to the Code of Civil Procedure, 1908, the Court may serve on the natural guardian of a minor defendant in a suit for arrears of rent a notice informing him that he

will be treated as the guardian of such defendant in respect of such suit, unless he appears and objects within such time, not being less than fourteen clear days after the service of the notice, as may be specified in the said notice, and, in default of compliance with such notice, such natural guardian shall, unless the Court otherwise directs, be deemed to be the duly appointed guardian of the said minor defendant for all the purposes of such suit :

- (i) a written statement shall be not filed without the leave of the Court, but the Court shall record its reasons for granting or refusing such leave;
- (j) the rules for recording the evidence of witnesses contained in rule 13 of Order XVIII in Schedule I to the Code of Civil Procedure, 1908, shall apply, whether an appeal is allowed or not;
- (k) (i) notwithstanding anything contained in the Code of Civil Procedure, 1908, where a suit is instituted for rent entered in a record-of-rights finally published under Chapter X or where the rent is payable under a registered lease between the landlord and the tenant or where the annual rent payable has been decreed in a previous suit between the landlord and the tenant, the Court may, if the plaintiff desires to proceed under this section, issue a special summons in the prescribed form;
- (ia) *service of the special summons referred to in sub-clause (i) shall ordinarily be effected by forwarding the summons by post in a letter with acknowledgment due addressed to the defendant and registered under Chapter VI of the Indian Post Office Act, 1898; and when a summons is so forwarded, and it is proved that the letter was duly posted and registered, the Court may presume that the summons has been duly served;*

- (ii) when a special summons *referred to in sub-clause (i) has been served*, if the defendant fails to appear and defend the suit, the allegations in the plaint as regards the rent due shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate of six per cent. *per annum* from the date of the suit up to the date of payment and for costs with interest thereon :

Provided that the Court may at its discretion in any case in which it thinks fit, direct the plaintiff to adduce evidence in support of his claim :

Provided also that notwithstanding anything contained in section 13 of the Indian Evidence Act, 1872, where a decree has been passed under this clause, no statement in the plaint regarding the nature, area and incidents of the tenancy or regarding any liability other than the rent claimed as due shall be evidence against the tenant in any subsequent suit or proceeding ;

- (iii) within seven days after the passing of a decree under sub-clause (ii) the Court shall send at the cost of the plaintiff to the defendant or defendants against whom the decree has been passed a registered postcard in the prescribed form stating the particulars contained in the decree; *and no action in execution of a decree shall be taken until a period of sixty days has elapsed since the date of the decree;*
- (iiia) *notwithstanding anything contained in section 34 of the Code of Civil Procedure, 1908, no interest shall be payable from the date of the decree on the aggregate sum decreed, if such aggregate sum is paid in full by the*

judgment-debtor within sixty days from date of the decree;

- (iv) notwithstanding anything contained in rule 13 of Order IX in Schedule I to the Code of Civil Procedure, 1908, or in section 153A of this Act, where a decree is passed *ex parte* against a defendant under sub-clause (ii), he may apply to the Court by which the decree was passed for an order to set aside the decree and the Court, if it is satisfied that summons was not duly served and that there is *prima facie* evidence of a *bona fide* defence, may make an order setting aside the decree as against him or if necessary against all or any of the other defendants also;
- (l) when any account-books, rent-rolls, collection-papers, measurement-papers, maps or extracts from records-of-rights have been produced by a party before any Court, and have been admitted in evidence in a suit pending therein,
copies of, or extracts from, such documents, may be certified by a duly authorized officer of such Court to be true copies or extracts without the payment of any court-fee, and such copies or extracts, may, with the permission of the Court, be substituted on the record for the originals, which may then be returned to the party, and thereafter copies and extracts, so certified, may be admitted in evidence in any other suit instituted in the same or any other Court, unless the Court before which they are produced sees fit to require the production of the originals;
- (m) the Court may, when passing the decree, order on the oral application of the decree-holder the execution thereof, unless it is a decree for ejectment for arrears;
- (n) notwithstanding anything contained in sub-rule (3) of rule 11 of Order XXI in Schedule I to the Code of Civil Procedure, 1908, the Court shall not, unless for special

reasons to be recorded in writing direct the decree-holder to file a copy of the decree or any fresh *vakalatnama* for the purpose of executing the decree;

- (o) notwithstanding anything contained in rule 16 of Order XXI in Schedule I to the Code of Civil Procedure, 1908, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him.

I. Amendment :—The words in *italics*, viz., sub-clause (ia), in sub-clauses (ii), (iii), and sub-clause (iiia) of clause (k) were inserted by the *B. T. (Amendment) Act VI of 1938*, sec. 31. The words "*identification. The plaint*" were substituted for the words "identification and the plaint" in clause (b), and the words "*referred to in sub-clause (i) has been served*" were substituted for the words "has been issued under sub-clause (i)" in sub-clause (ii) of clause (k) by the same Act. The words "upon his depositing one half of the amount recoverable under the decree" in sub-clause (iv) of clause (k) were omitted by that Act.

*B. T.
(Amend-
ment) Act
VI of 1938.*

2. Effect of the Amendments :

- (i) Service of *special* summons shall ordinarily be effected by registered post with acknowledgment due.
- (ii) Decree cannot be executed until the expiry of 60 days from the date of the decree.
- (iii) No interest is to be paid from the date of the decree if the decretal amount be paid in full within 60 days from the date of the decree.
- (iv) Provision for deposit of half the decretal amount in the case of application for setting aside *ex parte* decree under sub-clause (ii) of clause (k) has been omitted.

Headings of notes.

1. CLAUSE (b).
2. CLAUSE (g).
3. CLAUSE (h) : SERVICE OF NOTICE ON NATURAL GUARDIAN.
4. CLAUSE (o) : OLD CL. (h) : ASSIGNMENT OF RENT-DECREE.
5. DECREE FOR RENT.

Survey plots not mentioned in the plaint, effect of.

I. Clause (b) :—The plaint in a rent-suit shall set forth a list of the survey plots comprised in the tenancy and a statement of the rental of the tenancy. If the plaint does not contain those particulars the defendant may apply for them or the Court may direct the party to furnish them by way of amendment on terms as to costs. But it does not justify a dismissal of the suit itself : *Hakim Mahomed Raza v. Shaikh Zamiruddin*, 11 Pat. 624 : A.I.R. 1932 Pat. 355 : 140 I.C. 570. See also *Kesho Prasad Singh v. Ramdhar Rai*, A.I.R. 1931 Pat. 135 : 128 I.C. 785.

2. Clause (g) : Defect in service of summons, effect of :—When there were defects in the service of summons required by clause (g) of this section, they might be grounds for setting aside the *ex parte* decree under O. 9, r. 13, C. P. Code, but unless there was fraud with regard to service which kept the defendant in ignorance of the suit or unless by putting in a false return the plaintiff kept the Court in ignorance of the real state of affairs and thus enabled it to pass a decree which otherwise it could not have passed, no suit setting aside the decree would lie : *Kumar Sarat Kumar Roy v. Dharamdas Bhattacharjee*, 42 C.W.N. 375 : A.I.R. 1937 Cal. 738.

3. Clause (h) : Service of notice on natural guardian :— Notice under cl. (h), if may be given by Appellate Court. The special procedure prescribed for service of notice upon the natural guardian of a minor defendant under this clause is not available to any Court other than the trial Court or at any stage other than the suit stage. Notice of an appeal is to be given under the normal procedure prescribed by the C. P. Code : *Upendranath Das v. Kumudini Debi*, 37 C.W.N. 921.

When on being served with a notice under this clause, the natural guardian of a minor defendant does not object to his being appointed guardian, the Court would be wrong in appointing a Court guardian, though the natural guardian may not have appeared : *Raja Jagat Kishore Acharya Choudhury v. Badan Mandal*, 41 C.W.N. 895 : 66 C.L.J. 558.

4. Clause (o) : Old cl (h) : Assignment of rent decree : The assignee of a decree for arrears of rent without assignment of the landlord's interest is not entitled to apply for execution of that decree even as a simple decree for money under the C. P. Code. The application is barred by sec. 148, clause (o) of the B. T. Act : *Rahimuddi Lupti v. Jogendra Kumar Sinha*, 54 C.L.J. 596. See also *Bijonbala Dutta v. Muthra Nath Sikdar*, 58 Cal. 798 : 35 C.W.N. 51 ; *Gopendra Prasad Sukul v. Ram Kishore Saha*, 60 Cal. 1181 : 37 C.W.N. 901. The fact that the assignee is substituted under Or. 21 r. 16 of the C. P. Code in place of the original decree-holder without any objection by the judgment-debtor does not bar the raising of the objection under sec. 148, clause (o) subsequently by the judgment-debtor : *Ibid.* See also *Kedar Nath v. Samra Kazi*, 17 Pat. 189 : A.I.R. 1938 Pat. 95.

There being a *conflict of judicial opinion*, the question "whether the assignee of a rent-decree without assignment of the landlord's interest can execute the decree as a money decree by attachment of moveable property under the provision of the C. P. Code", was referred to a *Full Bench* in the case of *Gopal Chandra Kundu v. Drastulla Sheikh*, 28 C.L.J. 33 (notes), but the question was not decided as the appeal was held to be incompetent under sec. 153 of the B. T. Act. It is submitted with great respect that upon a proper interpretation of the provisions and scope of sec. 148 (o) it appears that its effect is not to prohibit execution altogether on the part of the transferee of the decree without the landlord's interest but it merely means that such a transferee cannot execute it as a rent-decree under the B. T. Act but can execute it under the C. P. Code as a money-decree. The law does not prohibit the assignment of a rent-decree. Arrears of rent can also be assigned and the assignee obtaining a decree for such arrears without the landlord's interest vested in him

Comment.

can execute it as a money decree. If the arrears ripen into a decree and then it is assigned without the landlord's interest there can be no valid ground why such an assignee should be debarred from executing such a decree as a money decree. The words "*a decree for arrears obtained by a landlord*" in sec. 148 (o), it is submitted, may be interpreted to mean a *rent decree*, and it appears that there is nothing in that clause prohibiting the execution of such a decree as a money decree. The question of harassment of tenants which has been made a ground for holding in some of the above decisions that such a decree cannot be executed as a money decree can really arise if it is sought to be executed as a *rent-decree*. *It appears that the matter requires a decision by a Full Bench or an amendment by the Legislature to make the law clear that such a decree can be executed as a money decree.*

Usufructuary mortgagee from landlord also getting assignment of rent decree, whether can maintain application for execution.

Assignee of decree includes also assignee by operation of law.

A usufructuary mortgagee from the landlord who also gets an assignment of a rent-decree obtained by the landlord is entitled to maintain an application for execution of the decree assigned. Sec. 148, clause (o) of the B. T. Act does not stand in his way: *Radharani Basu v. Dwarkanath Mandal*, 41 C.W.N. 608.

An application for execution of a decree obtained by the owner of a life-estate of certain properties for arrears of rent of a *putni* lease granted by her of the said properties is not maintainable, after her death, by the executors of her will who were also the legatees of the decretal amount—the landlord's interest not being vested in such applicants for execution. It makes no difference that the *putni* ceased to exist with the demise of the grantor. An assignee of the decree in sec. 148 (o) includes an assignee by the operation of law: *Akhil Kanto Lahiri v. Aswini Kanto Bhattacharja*, 40 C.W.N. 589.

A rent-decree obtained by the *karta* and the other members of a joint Mitakshara Hindu family was assigned by them by a deed in favour of a company. Some members of the family who were minors were not, however, parties to this deed of assignment. The assignee applied for execution and the judgment-debtor^f pleaded in bar of execution that the deed was void under sec. 148 (o) and the decree would not therefore be executed, *held*, that it was not competent to the judgment-debtor to raise the objection and that the question of the validity of the deed was a matter between the minors and the transferee company: *Bajpai Estate Ltd. v. Karali Charan Sarma*, 61 C.L.J. 84.

5. Decree for rent :—The defendant was sued as the registered tenant liable for rent in respect of a tenancy which appertained to a wakf of which the defendant himself was the *mutwali*. The defendant was not, however, described as the *mutwalli*, *held*, that nevertheless, the decree for rent obtained by the landlord was an effective rent-decree as the estate was fully represented by the defendant and the sale held in pursuance of that decree was a rent sale: *Habibulla Gazi v. Annada Charan Kajari*, 58 C.L.J. 430: A.I.R. 1934 Cal. 269: 149 I.C. 679.

A decree obtained in a rent suit partly for assigned rent and partly for rent during the period in which the plaintiff was the landlord is a rent-decree: *Mahomed Nazim Khan v. Ramjiwan Sahu*, A.I.R. 1934 Pat. 106: 154 I.C. 396.

148A. (1) A co-sharer landlord may institute a suit to recover the rent due to him in respect of his share in a tenure or holding, by making all the remaining co-sharer landlords parties defendant to the suit, and claiming that relief be granted to him in respect of his share of the rent against the entire tenure or holding.

Power to co-sharer landlord to sue for rent in respect of his share in a tenure or holding against the tenure or holding on making remaining co-sharers parties.

(2) On the plaint being admitted, the Court shall by summons in the prescribed form call upon the remaining co-sharer landlords aforesaid to join in the suit as co-plaintiffs for their shares of the rent due to them in respect of the tenure or holding up to the date of the institution of the suit.

(3) On the date named in the summons for his appearance or on any subsequent date fixed by the Court in this behalf, any co-sharer landlord, who has been summoned as defendant, may apply to be joined in the suit as a co-plaintiff, and on his paying the court-fee on the amount of his claim, he shall be joined as a co-plaintiff in respect of the rent claimed to be due to him up to the date of the institution of the suit.

(4) If it comes to the notice of the Court that any co-sharer landlord has before the service upon him of a summons under sub-section (2) instituted a separate suit to recover his share of the rent of the tenure or holding, the separate suit shall be consolidated with that brought under sub-section (1) and such co-sharer landlord shall be deemed to be a co-plaintiff and shall amend his plaint so as to claim the rent due to him up to the date of the institution of the suit under sub-section (1):

Provided that, if the Court is not competent to consolidate and try the suit, such suit shall be transferred to a Court of competent jurisdiction for consolidation and trial.

(5) The summons on all the defendants to the suit other than co-sharer landlords shall thereafter be served and the Court shall thereupon proceed to the trial of the suit.

(6) A decree passed by the Court for the rent claimed in a suit brought in accordance with the foregoing provisions of this section shall, so far as may be, specify separately the amounts payable to each co-sharer and shall, as regards the remedies for enforcing the same, be as effectual as a decree obtained by a sole

landlord or an entire body of landlords in a suit brought for the rent due to all the co-sharers.

(7) When one or more co-sharer landlords, having obtained a decree in a suit framed under this section, applies or apply for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application of the execution to the other co-sharers.

(8) (i) In disposing of the proceeds of the sale in execution of the decree referred to in sub-section (6) the following rules, instead of those contained in section 73 of the Code of Civil Procedure, 1908, shall be observed,—

- (a) there shall first be paid to the decree-holders the costs incurred by them in bringing the tenure or holding to sale;
- (b) there shall in the next place be paid to the decree-holders the amount due to them under the decree in execution of which the sale was made;
- (c) if there remains a balance after these sums have been paid, there shall be paid therefrom to the decree-holders and to any defendant landlords, who have not joined as plaintiffs, but have made application in this behalf within one month from the date of the confirmation of the sale, any rent which may have fallen due to them in respect of the tenure or holding between the institution of the suit and the date of the confirmation of the sale, in proportion to their respective shares in the tenure or holding :

Provided that the Court shall issue a notice to the judgment-debtor or his pleader, if any, before ordering any such payment;

- (d) the balance (if any) remaining after the payment of the rent mentioned in clause (c) shall, upon the expiration of two months from the confirmation of the sale, be paid to the judgment-debtor on his application unless the Court for reasons to be recorded in writing otherwise directs.

(ii) If the judgment-debtor disputes the right of the decree-holder or of the co-sharer landlord who has

been made a party defendant to receive any sum on account of rent under clause (c), the Court shall determine the dispute and the determination shall have the force of a decree.

(9) When a suit has been instituted under the provisions of sub-section (1), no co-sharer landlord, who has been made a party defendant thereto, and duly served with summons issued under sub-section (2), shall be entitled to recover, save as co-plaintiff in that suit, any rent in respect of the tenure or holding for the period in suit or for any period previous thereto.

(10) Where a suit instituted under the provisions of sub-section (1) has been withdrawn with leave to bring a fresh suit, the procedure, remedies and disabilities hereinbefore provided by this section shall apply to such fresh suit when instituted and to the parties thereto.

(11) In the event of the holding or tenure not being sold as a result of a suit instituted under sub-section (1), nothing contained in rule 2 of Order II in Schedule I to the Code of Civil Procedure, 1908, shall preclude a co-sharer landlord who has been joined as plaintiff under sub-section (3) or is deemed to be a co-plaintiff under sub-section (4) from recovering by suit, rent and interest due to him and damages, if awarded, in respect of the tenure or holding for the period subsequent to the date of the institution of the suit under this section.

(12) If the rent claimed in a plaint as amended under sub-section (4) is less than the rent claimed in the original plaint in the separate suit referred to in that sub-section, the balance of rent may be recovered under the provisions of clause (c) of sub-section (8) or of sub-section (11).

Headings of Notes.

1. CO-SHARER LANDLORD.
2. PARTIES.
3. LIMITATION.
4. RESJUDICATA.
5. CLAUSE (8).
6. CLAUSE (9).

I. Co-sharer Landlord:—The decision as to the rate of rent in the suit by a co-sharer landlord for his share of the rent only under this section cannot operate as binding on the other co-sharer landlord who are joined as defendants with the tenants: *Tannangini Debi v. Abhoya Charan Sardar*, 33 C.W.N. 1221.

Suit by co-sharer landlord for less than his share of rent but otherwise conforming to s. 148A : Decree in such suit, if rent decree.

A decree for rent passed in a suit by a co-sharer landlord which conforms to the provisions of sec. 148A of the Bengal Tenancy Act is a rent decree within the meaning of Chapter XIV of the Act although the amount of rent claimed in the suit may be less than the share of such landlord : *Biraj Krishna Mukherjee v. Purna Chandra Trivedy*, 41 C.W.N. 361.

Rent suit by co-sharer—other co-sharers claiming to be tenant by purchase in his rent decree—Court can consider the validity of such purchase and such decision binds the parties : *Harekrishna Datta v. Gourhari Setna Poddar*, 59 Cal. 1250 : A.I.R. 1932 Cal. 894 : 141 I.C. 56.

The special provisions of sec. 148A continue to be applicable even after the partition when different pieces of land comprising the holding have been allotted to different landlords. Where subsequent to a decree for rent a partition is effected and the decree-holder continues as a co-sharer, he can bring the entire holding to sale : *Mt. Nepur Kuer v. Bhan Parlap*, A.I.R. 1935 Pat. 227 : 156 I.C. 881.

If a co-sharer landlord who is made a party-defendant under sec. 148A, appears he is bound by the decree. If he does not then he is bound by such adjudication as is actually made and is necessary to be made in giving proper relief to the plaintiff in accordance with the provisions of sec. 148A : *Niharbala Debi v. Sasadhar Roy Chowdhury*, 58 Cal. 358 : A.I.R. 1931 Cal. 485 : 134 I.C. 567. As to non-applicability of the doctrine of equitable estoppel to such a case : *Ibid.* See notes under sec. 158B.

Third persons not impleaded in but claiming to be co-sharer landlords, if can be added as parties.

2. Parties :—In a suit for rent framed under sec. 148A of the Bengal Tenancy Act persons not impleaded as parties defendants, but claiming to be co-sharer landlords, are not entitled, as of right, to intervene on their own application and to be added as parties : *Mahomed Mohsen Ali v. Rai Ksitish Bhusan Roy Bahadur*, 39 C.W.N. 1010 : 62 C.L.J. 38. As to the question of defect of parties, see *Kirtyananda Singh Bahadur v. Radha Benode Gupta*, 58 C.L.J. 474 : A.I.R. 1934 Cal. 278.

3. Limitation :—Where in a rent suit a co-sharer landlord is originally made a defendant, but subsequently joined as a co-plaintiff on his application under sec. 148A, the claim of such co-plaintiff in such suit for rent due to him is not barred by the special limitation for a rent suit : *Bhujanga Bhusan Mukherjee v. Kalidas Das*, A.I.R. 1937 Cal. 333.

A co-sharer landlord purchaser of non-transferable occupancy holding has 12 years from the date of his purchase to bring a suit for possession on the basis of such purchase against a prior transferee. Time does not run against such landlord auction-purchaser from the date of the prior transferee's purchase : *Bepin Chandra Mukhopadhyaya v. Taraprasanna Chakrabarty*, 39 C.W.N. 451 : 62 C.L.J. 20.

4. Resjudicata :—When a suit under sec. 148A by a co-sharer is decided, other co-sharers who are impleaded in the suit as defendants are precluded from instituting another suit for their shares of rent framed under sec. 148A. Such a suit will be barred by *res judicata* as the entire rent was in issue in the previous suit and the

decree passed was in effect for the entire rent : *R. C. Deb v. Lachhmi Prasad Singh*, A.I.R. 1934 Pat. 350 : 150 I.C. 970.

5. Clause (8) :—Although no period of limitation has been prescribed for an application by a co-sharer landlord decree-holder to share in the sale-proceeds received in a sale held at the instance of another co-sharer landlord decree-holder under cl. (8) of sec. 148A of the B. T. Act, such application must be made within a reasonable time. In the circumstances of this case it was held that the application made after a year and half was barred : *Jagadamba Loan Co., Ltd. v. Satyendra Chandra Ghose Moulik*, I.L.R. [1938] 1 Cal. 175 : 41 C.W.N. 1248 : A.I.R. 1937 Cal. 730. Limitation.

6. Clause (9) :—A decree passed in a suit for rent framed under sub-sec. (1) of this section cannot be challenged in a subsequent proceeding on the ground that there was no compliance with the provisions of sub-sec. (9) : *Kalipada Bhandari v. Panchkari Mondal*, 40 C.W.N. 531.

A suit for rent by a co-sharer landlord to recover rent due in respect of his share, to which the other co-sharer landlords are made parties under the provisions of sec. 148A does not bar under sub-sec. (9) of the said section the further prosecution of certificate-proceeding previously instituted by the other co-sharers in respect of their shares. And if the latter choose to withdraw from the certificate-proceedings and join in the suit as co-plaintiffs under sub-sec. (3), they are not entitled to claim, under sec. 14 of the Limitation Act, the exclusion of the time of the proceeding before the Certificate Officer : *Hrishkesh Mitra v. Barada Prasad Ray Chaudhuri*, I.L.R. [1938] 1 Cal. 262.

149. (1) When a defendant admits that money is due from him on account of rent, but pleads that it is due not to the plaintiff, but to a third person, the Court shall refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due. Payment into Court of money admitted to be due to third person.

(2) Where such a payment is made, the Court shall forthwith cause notice of the payment to be served on the third person.

(3) Unless the third person within three months from the receipt of the notice institutes a suit against the plaintiff and therein obtains an order restraining payment out of the money, it shall be paid out to the plaintiff on his application.

(4) Nothing in this section shall affect the right of any person to recover from the plaintiff money paid to him under sub-section (3).

Sub-sec. (3) : Appeal :—A decree in a suit under this sub-sec. is appealable : *Gyanoda Charan Banerji v. Dharanimohan Roy*, 62 C.L.J. 287.

Payment
into Court
of money
admitted to
be due to
landlord.

150. When a defendant admits that money is due from him to the plaintiff on account of rent, but pleads that the amount claimed is in excess of the amount due, the Court shall refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due.

Court : Deposit of admitted amount :—Part of rent claimed was admitted by the tenant defendant but was not deposited in Court. Still the trial Court went on with the trial. The amount however was deposited in the appellate Court which accepted the deposit, *held* that the appellate Court was competent in accepting the deposit: *Naunit Prayaji v. Bandhu Mahton*, A.I.R. 1930 Pat. 414.

Provisions
as to pay-
ment of
portion of
money.

151. When a defendant is liable to pay money into Court under section 149 or 150 if the Court thinks that there are sufficient reasons for so ordering, it may take cognizance of the defendant's plea on his paying into Court such reasonable portion of the money as the Court directs.

Court to
grant
receipt.

152. When a defendant pays money into Court under either of the said sections, the Court shall give the defendant a receipt, and the receipt so given shall operate as an acquittance in the same manner and to the same extent as if it had been given by the plaintiff or the third persons, as the case may be.

Appeals in
rent suits.

153. An appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where—

(a) the decree or order is passed by a District Judge, Additional Judge or Subordinate Judge, and the amount claimed in the suit does not exceed one hundred rupees,
or

(b) the decree or order is passed by any other judicial officer specially empowered by the *High Court* to exercise final jurisdiction under this section, and the amount claimed in the suit does not exceed fifty rupees;

unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto or a question of a right to enhance or vary the

rent of a tenant, or a question of the amount of rent annually payable by a tenant :

Provided that the District Judge may call for the record of any case in which a judicial officer as afore-said has passed a decree or order to which this section applies, if it appears that the judicial officer has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested or has acted in the exercise of his jurisdiction illegally or with material irregularity, and may pass such order as the District Judge thinks fit.

Explanation.—A question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

Amendment:—The words in *italics* “*High Court*” in clause (b) were substituted for the words “*Provincial Government*” by the Bengal Tenancy (Amendment) Act VI of 1938, sec. 32.

Headings of Notes.

1. TITLE TO LAND OR SOME INTEREST IN LAND AS BETWEEN PARTIES HAVING CONFLICTING CLAIMS THERETO.
2. AMOUNT OF RENT ANNUALLY PAYABLE.
3. QUESTION OF TITLE IN RENT SUIT.
4. SEC. 153 : EXPLANATION.
5. SEC. 153 : EXPLANATION ; SEC. 174 (5).
6. SEC. 153 : OR. 9 R. 13.
7. SECOND APPEAL.
8. REVISION.
9. WAIVER.

I. Title to land, or some interest in land as between parties having conflicting claims thereto:—Where plaintiff brought a suit against the defendant, admittedly a *lakherajdar* for the recovery of drainage cess and the trial Court held that cess was payable direct to the Government and not to the plaintiff. The Court of appeal below held that no appeal lay against that decision under sec. 153, held in revision that the only question for determination in the case was whether the cess was to be paid direct to Government or through the plaintiff and this could hardly be said to raise a question referred to in sec. 153 : *Rai Saheb Debendra Nath Basu v. Atmananda Bhattacharjee*, 37 C.W.N. 920.

Decision as to whether drainage cess is payable direct to Government or through the plaintiff.

If in a suit for recovery of rent valued at less than Rs. 50 some of the defendants disclaim their liability to pay rent to the landlord under the cover of transfer to other defendants then the suit involves a question of title, whether the title lay in the alleged transferee or in the transferring tenants, and liability of such tenants to pay rents

and as such there is a question of title between persons having conflicting claims thereto within the meaning of sec. 153: *Bepin Chandra v. Raj Kumar*, A.I.R. 1929 Cal. 645.

2. Amount of rent annually payable :—The question regarding the existence of a custom that on failure of crops in any particular year the tenants would get remission of their rents for that year is not a question regarding the amount of rent annually payable: *Raimoni Dasi v. Upendranarain Das Mahapatra*, A.I.R. 1930 Cal. 251.

Decision allowing total suspension of rent, if one deciding question of amount of rent payable.

Mafi, if rent.

It is difficult to distinguish on principle a case of total suspension of the rent from a case of abatement of rent or a decree for rent at a rate lower than that claimed by plaintiff. Where the Court decides that there should be total suspension of rent the question is of the amount of rent annually payable by a tenant, and as such a second appeal is competent: *Saboratulla Sheikh v. Manik Jan Bibi*, A.I.R. 1936 Cal. 323.

Mafi is not rent but a payment for services rendered and therefore in a case where *mafi* is claimed the amount of rent is not in question between the parties within the meaning of sec. 153: *Dharam Nath Missir v. Mangla Pershad Singh*, A.I.R. 1936 Pat. 65. Where however *mafi* is claimed as an incident of the tenancy then the decision regarding it in a rent suit is a matter which affects the amount of rent: *Dwarkanath Pandey v. Kamta Prasad Singh*, A.I.R. 1937 Pat. 199.

3. Question of title in rent suit :—The Courts below were held to be justified in deciding a question of title, between two persons A and B in a suit for rent by A against the tenant in which B was made a *proforma* defendant on the ground of his objection to join in the suit, the issue *inter alia* being whether A or B was the landlord. A and B fully understood their position and the question was fully fought out by them in the lower Courts: *Akhil Chandra Dutta Choudhury v. Ramani Ranjan Dutta Chowdhury*, 57 C.L.J. 287: A.I.R. 1933 Cal. 824.

There is no rigid rule that a question of a title may not be raised in a rent suit. Where the question is raised at the instance of the tenant and the tenant pleads that rent is not due to the plaintiff but to a third party and his plea involves complicated question of title it may be wise for the Court not to enter into it: *Ananga Mohon Roy Chowdhury v. Nawab Khaje Habibulla*, 53 C.L.J. 415: A.I.R. 1931 Cal. 673.

4. Sec. 153 : Explanation :—Where a Munsif who was empowered to exercise final jurisdiction under sec. 153 (b), Bengal Tenancy Act, set aside a sale held in execution of a decree for rent at a claim not exceeding Rs. 50, on the ground that the processes of the sale were not served and observed that this might be due to fraud on the part of the decree-holder but there was no finding of fraud which could be said to be independent of the irregularity of the proceedings in publishing and conducting the sale, and on appeal the District Judge on a consideration of the evidence held that the processes were served and reversed the order of the Munsif, *held* that the irregularity found by the Munsif was covered by the explanation to sec. 153 and no appeal lay to the District Judge and

the order of the District Judge to set aside has been without jurisdiction: *Bindubashini Debi v. Prabhat Chandra Sarkel*, 38 C.W.N. 1183: 60 C.L.J. 126.

Fraud tainting the sale-proceedings is covered by irregularity such as is contemplated by the explanation and is not a separate matter taking the case outside the explanation giving a right of appeal. The provisions of sec. 153 with the explanation are exceptions to the general right of appeal given by sec. 174, clause (5): *Jugal Chandra Anuni v. Ramesh Chandra Chakravarty*, 34 C.W.N. 331.

Where an execution sale is set aside on the ground of fraud, an appeal is competent as the explanation to sec. 153 does not contemplate fraud and is limited to irregularity in publishing or conducting the sale: *Jainarain Singh v. Rameshwar Singh Bahadur*, A.I.R. 1930 Pat. 371.

5. 153: Explanation; Sec. 174 (5):—The general right of appeal given by sec. 174 (5) is controlled by the explanation to sec. 153. In a case coming under sec. 153 if the fraud alleged is not something independent of irregularity in the sale-proceedings no appeal lies from the order passed on such an application: *Benoy Bhusan Das v. Umacharan Poddar*, 36 C.W.N. 330.

6. S. 153: Or. 9, r. 13:—An appeal lies from an order under Or. 9, r. 13, C. P. Code, rejecting an application for setting aside an *ex parte* decree in a rent suit valued at Rs. 50/- or less although from the decree in the suit no appeal lies because of the trying munsif having final jurisdiction: *Mahendra Chandra Dutta Roy v. Basiruddin*, 40 C.W.N. 992: 63 C.L.J. 277. See also *Badiur Rahaman v. Mokramali*, 36 C.W.N. 540: 56 C.L.J. 145.

7. Second appeal: Where a Munsif, having final jurisdiction passes a rent-decree for a sum less than Rs. 50/- and does not decide any question coming within the proviso to sec. 153, and an appeal being taken, the appellate Court also does not decide any such question, no second appeal lies although the appeal to the lower appellate Court was incompetent: *Amirul Islam v. Sarada Kumar Sen*, 40 C.W.N. 149. (*Wazzuddi Pramanik v. Mahammad Balaki Moral*, 30 C.W.N. 63, doubted).

Where a decree has been passed without jurisdiction, an appeal lies precisely in the same way as if it had been made with jurisdiction. Where, therefore, by reason of the provisions of sec. 153 of the B. T. Act, no appeal lies to the High Court from a decree of the lower appellate Court if passed with jurisdiction, no appeal also will lie, if the decree is passed without jurisdiction: *Hrishikesh Chakravarty v. Nilmadhab Chattopadhyaya*, 67 C.L.J. 484: A.I.R. 1938 Cal. 543.

Where in a suit for arrears of rent with an alternative prayer for decree for money, a second appeal would be barred under sec. 153 of the B. T. Act, so far as the claim for rent is concerned, and the claim for money would be cognizable by a Court of Small Causes the amount claimed being below Rs. 500/-, not allowing of a second appeal by reason of sec. 102, C. P. Code, the bar of second appeal cannot be evaded by the joinder of the two claims, and amalgamating the two claims in one suit: *Bankim Chandra Deb Sarkar v. Madan Mohan Deb*, 40 C.W.N. 698.

Second appeal, if lies in suit claiming alternative reliefs when appeal in suit claiming such reliefs separately will be barred.

Claims for arrears of rent and for enhancement were made in a rent suit but the claims were kept quite distinct and separate, and enhancement was claimed only subsequent to the period covered by the arrears of rent claimed, and the Court also adopted the same course in passing decree in the suits, *held*, that a second appeal was barred under sec. 153 against the decree for arrears of rent: *Sheikh Altapali v. Srish Chandra Dutta*, 37 C.W.N. 806.

Where in a rent suit valued at less than Rs. 100/- the Munsif tried the question of title but the lower appellate Court held that the suit as framed was not maintainable and the complicated question of title could not be decided, *held* that as no question of title was decided by the lower appellate Court no second appeal lay: *Ananga Mohon Roy Choudhury v. Nawab Khaji Habibulla*, 53 C.L.J. 415: A.I.R. 1931 Cal. 670.

Utbandi
tenancy.

Even if tenancy is an *utbandi* tenancy, still if the Court has decided what is the rate of rent which is payable, or whether the rent is payable in respect of certain lands, appeal can lie against the decision: *Nafar Chandra v. Jatindra Nath*, A.I.R. 1929 Cal. 206: 118 I.C. 881.

8. Revision :—Where a District Judge has failed to revise an order under sec. 153, the High Court has power in a proper case to interfere in revision under sec. 115, C. P. Code: *Kameshwar Singh v. Mahabir Pasi*, A.I.R. 1936 Pat. 420.

9. Waiver :—Where an appeal is incompetent under sec. 153 mere waiver or want of objection on the part of the respondent as to the maintainability of the appeal cannot confer jurisdiction on the appellate Court to hear the appeal: *Piru Pramanik v. Pabna Dhanabhandar Co., Ltd.*, 41 C.W.N. 958.

Deposit on
application
to be set
aside *ex*
parte decree.

153A. Every application for an order under rule 13 of Order IX in Schedule I to the Code of Civil Procedure, 1908, to set aside a decree passed *ex parte*, or for a review of judgment, under section 114 and rule 1 of Order XLVII in Schedule I to the said Code, in a suit between a landlord and tenant as such, shall contain a statement of the injury sustained by the applicant by reason of the decree or judgment;

and no such application shall be admitted—

- (a) unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented the amount, if any, which he admits to be due from him to the decree-holder, or such amount as the Court may, for reasons to be recorded by it in writing, direct; or
- (b) unless the Court, after considering the statement of injury, is satisfied, for reasons to be recorded by it in writing, that no such deposit is necessary.

154. A decree for enhancement of rent under this Act, if passed in a suit instituted in the first eight months of an agricultural year, shall ordinarily take effect on the commencement of the agricultural year next following; and, if passed in a suit instituted in the last four months of the agricultural year, shall ordinarily take effect on the commencement of the agricultural year next but one following; but nothing in this section shall prevent the Court from fixing, for special reasons, a later date from which any such decree shall take effect.

Date from which decree for enhancement takes effect.

155. (1) A suit for the ejection of a tenant, on the ground—

Relief against forfeitures

(a) that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or

(b) that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejection,

shall not be entertained unless the landlord has served in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request.

(2) A decree passed in favour of a landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the misuse or breach, and whether, in the opinion of the Court, the misuse or breach is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay that amount to the plaintiff, and, where the misuse or breach is declared to be capable of remedy, to remedy the same.

(3) The Court may, from time to time, for special reasons, extend a period fixed by it under sub-sec. (2).

(4) If the defendant, within the period or extended period (as the case may be) fixed by the Court under this section, pays the compensation mentioned in the decree, and, where the misuse or breach is declared

by the Court to be capable of remedy, remedies the misuse or breach to the satisfaction of the Court, the decree shall not be executed.

Headings of Notes.

1. DECREE UNDER SEC. 155.
2. BREACH OF CONDITION.
3. MISUSE.
4. TENANT: TRANSFeree FROM LESSEE.
5. NOTICE.

1. Decree under S. 155.—The decree under sec. 155 is a decree in the alternative, directing payment of compensation and remedying of misuse within a certain time and on failure, ejectment. If the first alternative is not complied with, the decree-holder is entitled to execute the second directing ejectment without obtaining a fresh decree: *Kiron Chandra Ghose v. Hamid Khan*, 33 C.W.N. 1224.

2. Breach of condition :—Sec. 155 does not purport to deal with the legality or otherwise of any condition on breach of which the tenant may under the terms of his contract with his landlord be liable to ejectment, and is therefore not affected by any implication in the proviso to sec. 10 of the Act; it only regulates the modes in which the landlord may obtain ejectment and the Court may give him that relief: *Ram Chandra Naik Kalia v. Ajodhya Singh*, I.L.R. 15 Pat. 8: A.I.R. 1935 Pat. 508: 158 I.C. 399.

3. Misuse :—Erection of a mosque for public worship in a plot of land comprised in an agricultural holding is such a misuse of the land as would entitle the landlord to have a decree for ejectment under sec. 155: *Srish Chandra Ganguli v. Esom Mussalli*, 38 C.W.N. 93.

It is not enough for a decree under sec. 155 to find that a continuance of the alleged misuse for a sufficient length of time would produce injurious results. What has to be found is that in fact the misuse has resulted in rendering the land unfit for the purpose of cultivation: *Nripendra Bhusan Roy v. Jogendra Nath Roy*, 60 Cal. 1110: A.I.R. 1933 Cal. 890.

4. Tenant: Transferee from lessee :—A transferee from a lessee, who is bound by a covenant in the lease not to alienate, is a tenant, and is not therefore entitled to the benefit of sec. 155: *Thakur Dayal Singh v. Promotho Nath Mitra*, 15 Pat. 673: A.I.R. 1936 Pat. 493: 164 I.C. 811.

5. Notice :—Even when the lessor sues the lessee in ejectment on the footing that the latter had forfeited the tenancy by a breach of the conditions of the lease, sec. 155 of the B. T. Act would apply, the lessee not ceasing to be a tenant immediately on the breach. Consequently such a suit, without a notice under sec. 155, is not maintainable: *Swarnamoyee Debya v. Aoyajaddi*, 60 Cal. 47: 36 C.W.N. 819: A.I.R. 1932 Cal. 787: 139 I.C. 239.

Transferee
from lessee
bound by a
covenant
not to
alienate, if
tenant.

156. The following rules shall apply in the case of every *raiyyat* or under-*raiyyat* ejected from a holding—

Rights of ejected *raiyyats* in respect of crops and land prepared for sowing.

- (a) when the *raiyyat* or under-*raiyyat* has, before the date of his ejectment, sown or planted crops in any land comprised in the holding, he shall be entitled, at the option of the landlord, either to retain possession of that land and to use it for the purpose of tending and gathering in the crops, or to receive from the landlord the value of the crops as estimated by the Court executing the decree for ejectment;
- (b) when the *raiyyat* or under-*raiyyat* has, before the date of his ejectment, prepared for sowing any land comprised in his holding, but has not sown or planted crops in that land, he shall be entitled to receive from the landlord the value of the labour and capital expended by him in so preparing the land, as estimated by the Court executing the decree for ejectment, together with reasonable interest on that value;
- (c) but a *raiyyat* or under-*raiyyat* shall not be entitled to retain possession of any land, or receive any sum in respect thereof under this section where, after the commencement of proceedings by the landlord for his ejectment, he has cultivated or prepared the land contrary to the local usage; and
- (d) if the landlord elects under this section to allow a *raiyyat* or under-*raiyyat* to retain possession of the land, the *raiyyat* or under-*raiyyat* shall pay to the landlord, for the use and occupation of the land during the period for which he is allowed to retain possession of the same, such rent as the Court executing the decree for ejectment may deem reasonable.

Notes : Growing Crop :—The right to the growing crop passes by the sale of the land, in the absence of an express provision to the

contrary, and that in case of Court sale, the right to the possession of the crop accrues from the date of delivery of possession of the land: *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhagirath Mahato*, 59 C.L.J. 482 at p. 489.

Power for Court to fix fair rent as alternative to ejectment.

157. When a plaintiff institutes a suit for the ejectment of a trespasser he may, if he thinks fit, claim as alternative relief that the defendant be declared liable to pay for the land in his possession a fair and equitable rent to be determined by the Court, and the Court may grant such relief accordingly.

Application to determine incidents of tenancy.

158. (1) Subject to the provisions of section 111, the Court having jurisdiction to determine a suit for the possession of land may, on the application of either the landlord or the tenant of the land, determine all or any of the following matters, namely:—

(a) the situation, quantity and boundaries of the land;

(b) the name and description of the tenant thereof (if any);

(c) the class or classes to which he belongs, that is to say, whether he is a tenure-holder, *raiyat* holding at fixed rates, occupancy-*raiyat*, non-occupancy-*raiyat*, or under-*raiyat* with or without a right of occupancy and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of of his tenure; and

(d) the rent payable by him at the time of the application.

(2) If, in the opinion of the Court, any of these matters cannot be satisfactorily determined without a local inquiry, the Court may direct that a local inquiry be held under Order XXVI in Schedule I to and section 78 of, the Code of Civil Procedure, 1908, by such Revenue-officer as the Local Government may authorize in that behalf by rule made under rule 9 of Order XXVI in Schedule I to the said Code.

(3) The order on any application under this section shall have the effect of, and be subject to the like appeal as, a decree.

1. Suit for confirmation of possession :—A decision under sec. 158 is no bar to a suit by the tenants for confirmation of possession of the land held by them ; *Hiralal Singh v. Matukdhari Singh*, A.I.R. 1938 Pat. 359.

Decision under s. 158, no bar to a suit for confirmation of possession.

2. Dispute as to relation of landlord and tenant :—In a proceeding under sec. 158, the Court has jurisdiction to decide as to the existence of the relationship of landlord and tenant between the parties : *Dwarakanath Das Sarkar v. Prasanna Kumar De*, 61 Cal. 72 : A.I.R. 1934 Cal. 413 : 151 I.C. 729.

CHAPTER XIII.A.

SUMMARY PROCEDURE FOR THE RECOVERY OF RENTS UNDER THE BENGAL PUBLIC DEMANDS RECOVERY ACT, 1913.

[**158A.** (Recovery of arrears of rent under the Certificate Procedure in certain areas), **158AA** (Recovery of arrears under the Certificate Procedure in certain other cases), **158AAA** (Passing of tenure or holding sold in execution of certificate)—*Chapter XIII.A repealed by the Bengal Tenancy (Amendment) Act VI of 1938, s. 33.*]

Notes: Sec. 158A :—Where there are more than one landlord with joint collection an application under sec. 158A must come from the entire body of landlords. Where an entire holding was originally under the management of Court of Wards but subsequently a portion was released and the owner of that portion applied for issue of certificate against the tenant and later the Manager of the Court of Wards also sent applications for the entire holdings, *held* that certificate could be issued in respect of the released portion of the estate : *Tarakeswar Roy v. Sarajubala Devi*, 57 C.L.J. 290 : A.I.R. 1934 Cal. 5 : 149 I.C. 1136.

Notes: Sec. 158AAA: Old Sec. 158B :—Sec: 158B applies to permanent tenures and it has to be read along with sec. 65 : *Hemlata Devi v. Maharaja Srish Chandra Nandy*, 39 C.W.N. 505. As to object of giving notice under sec. 158B, see *Niharbala Debi v. Sasadhar Roy Chaudhury*, 58 Cal. 358 : A.I.R. 1931 Cal. 485. The object of sec. 158B (2) is the protection of the co-sharer. The failure to effect notice is a mere irregularity and it is the co-sharer alone who can complain of it and it is open to him to waive the benefit of this section : *Bacha Singh v. Daro Singh*, 11 Pat. 498 : A.I.R. 1932 Pat. 284.

CHAPTER XIV.

SALE FOR ARREARS UNDER DECREE.

[**158B.** *Passing of tenure or holding sold in execution of decree or certificate. Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 99.*]

159. (1) Where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined in this Chapter as "protected interests", but with power to annul the interests defined in this Chapter as "incumbrances":

General powers of purchaser as to avoidance of incumbrances.

Provided as follows:—

(a) a registered and notified incumbrance within the meaning of this Chapter shall not be so annulled except in the case hereinafter mentioned in that behalf;

(b) the power to annul shall be exerciseable only in manner by this Chapter directed.

(2) Notwithstanding anything contained in the Code of Civil Procedure, 1908, whenever a tenure or holding is sold in execution of a decree for arrears of rent and the sale is confirmed, the purchase shall take effect from the date of confirmation of the sale.

(See notes under secs. 160, 161 and 167).

160. The following shall be deemed to be protected interests within the meaning of this Chapter:—

Protected interests.

(a) any under-tenure existing from the time of the Permanent-Settlement;

(b) any under-tenure recognized by the settlement proceedings of any current temporary settlement as a tenure at a rent fixed for the period of that settlement;

(c) any lease of land whereon dwelling houses, manufactories or other permanent buildings have been erected, or permanent gardens, plantations, tanks, canals, places

of worship or burning or burying grounds have been made;

- (d) any right of occupancy;
- (e) the right of non-occupancy-*raiyyat* to hold for five years at a rent fixed under Chapter VI by a Court, or under Chapter X by a Revenue-officer;
- (f) any right conferred on an occupancy-*raiyyat* to hold at a rent which was a fair and reasonable rent at the time the right was conferred;
- (ff) the right of a *raiyyat* at fixed rates to hold at a fixed rent or rate of rent which has not been changed during twenty years; and
- (g) any right or interest which the landlord at whose instance the tenure or holding is sold, or his predecessor in title, has expressly and in writing given the tenant for the time being permission to create.

Interest of under-*raiyyat* with right of occupancy, if protected interest under s. 160 cl. (d).

Clause (d) : "Any right of occupancy" :—The interest of an under-*raiyyat* with right of occupancy by custom when the under-*raiyyati* lease was in contravention of sec. 85 as it stood before the amendment of 1928 is not a protected interest within the meaning of sec. 160 (d) : *Kamini Sundari Bewa v. Nepal Mondal*, 35 C.W.N. 687 ; *Dinanath Dutta v. Kshitish Chandra Ghose*, 35 C.W.N. 1001. See also *Sonatan Dafadar v. Daulat Gazi*, 36 C.W.N. 400 : 55 C.L.J. 176, where it was held that before the amendment of 1928 an occupancy right acquired by an under-*raiyyat* by custom would be a protected interest under sec. 160 (d), but it would not be valid as against the landlord if the under-*raiyyati* lease was in contravention of sec. 85. See also *Mati Lal Das v. Aditya Chandra Das*, 38 C.W.N. 1209 : 60 C.L.J. 18, where the above cases were followed. *As to the law after amendment of 1928, see new section 48-G under which the interest of an under-raiyyat with right of occupancy is not a protected interest under sec. 160 (d).*

S. 48G.

Meaning of "incumbrance" and "registered and notified incumbrance."

161. For the purposes of this Chapter—

- (a) the term "incumbrance," used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in section 160;
- (b) the term "registered and notified incumbrance," used with reference to a tenure

or holding sold or liable to sale in execution of a decree for an arrear of rent due in respect thereof, means an incumbrance created by a registered instrument, of which a copy has, not less than three months before the accrual of the arrear, been served on the landlord in manner hereinafter provided;

- (c) the terms "arrears" and "arrear of rent" shall be deemed to include interest decreed under section 67 or damages awarded in lieu of interest under sub-section (i) of section 68.

Notes: Incumbrance :—See notes under sec. 167. The word "incumbrance" as used in B. T. Act is of wider import than the same word as used in sec. 37 of the Revenue Sales Act. An under-tenure created by the defaulting tenure-holder is an "incumbrance" as defined in sec. 161 of the B. T. Act but is not an incumbrance within sec. 37 of the Revenue Sales Act: *Turner Morrison & Co. Ltd. v. Monmohon Chowdhury*, 58 I.A. 440: 59 Cal. 728: 36 C.W.N. 29 (P.C.). See also *Sirajganj Loan Office Co Ltd. v. Sashimukhi Debi*, [1937] 1 Cal. 595: 41 C.W.N. 110: A.I.R. 1937 Cal. 36: 168 I.C. 538.

Under-tenure is incumbrance under the B. T. Act but not so under the Revenue Sales Act.

The word "incumbrance" does not include the interest of a landlord in land which though forming part of the tenancy was never put into possession of the tenant but has been held adversely by the landlord such an interest cannot be annulled as an incumbrance. Where certain lands though included in the *seputni* lease were never put in possession of the *seputnidar* but continued to be held by the *patnidar* in assertion of his own title; held, that the auction-purchaser of the *Seputni* at a rent sale could not treat those lands as forming an incumbrance on the *seputni* and annul the same by notice under sec. 167 and thereafter recover possession of the same by suit: *Midnapore Zemindary Co. Ltd. v. Radhika Nath Biswas*, 41 C.W.N. 81.

"Incumbrance", if it includes interest of landlord in land, which though forming part of tenancy, was never put in possession of tenant but has been held adversely by landlord.

The purchaser of a *putni taluk* at a rent sale, including the Zemindar when he is himself such purchaser, remains affected by a charge for maintenance on the *putni* even after he has granted a fresh *putni* of the land to a third party and so retains the power of annulling such a charge which is an incumbrance under sec. 161. Effect of a pre-existing charge on a *putni* on the purchaser thereof at a rent sale and on the grantee of an under-tenure from him considered; *Sirajganj Loan Office Co. Ltd. v. Sashimukhi Debi*, [1937] 1 Cal. 595: 41 C.W.N. 110: A.I.R. 1937 Cal. 36: 168 I.C. 538.

Purchaser of *putni taluk* at rent sale, if may annul charge for maintenance thereon after granting fresh *putni* to third party.

A mortgage of a non-transferable occupancy holding is an encumbrance within the meaning of sec. 161 of the Bengal Tenancy Act and a purchaser at a rent sale, whether he is a stranger or the landlord himself, is bound to serve a notice under sec. 167, if he wants to have the holding free of such encumbrance: *Annada Prosad Chatterjee v. Phanindra Bhusan Ghatak*, 41 C.W.N. 277:

Mortgage of non-transferable occupancy holding, if an incumbrance.

A.I.R. 1936 Cal. 381: A sale of the holding in execution of a mortgage decree subsequently to the sale in execution of the rent decree has not the effect of extinguishing the mortgage for all purposes and the purchaser in the later sale can fall back upon the mortgage and use it as a shield against the purchaser at the rent sale; in such a case, the holding in the hands of the purchaser at the rent sale would be subject to the mortgage: *Ibid.*

The definition of incumbrance in sec. 161 is not limited to transferable occupancy holding where a mortgage sale of a holding takes place before the rent sale or during the pendency of the rent suit, the purchase is a destruction of the mortgagor tenants' interest and not a limitation thereon. But a mortgage not enforced or enforced by sale after the rent sale is an incumbrance within the meaning of sec. 161: *Jogendra Nath Das v. Debendra Nath Ghosh*, 39 C.W.N. 428. Where there is an incumbrance it is to be avoided by the purchaser whether he be the landlord or a third party before he can obtain *khas* possession: *Ibid.*

Custom of *hajabad*, if incumbrance.

A custom of "*hajabad*" to the effect that the tenant is not liable to pay rent to his landlord for the year when there is an inundation is not an encumbrance which can be avoided by a purchaser at a revenue sale: *Nolin Behari Bosu v. Haripada Bhuiya*, 38 C.W.N. 139: A.I.R. 1934 Cal. 452: 149 I.C. 1093.

Permanent tenure-holder having no *mokurari* right, if can create *mokurari* under-tenure binding on the landlord.

The term "incumbrance" as defined in sec. 161 is wide enough to include any interest in the tenure, *mokurari* or otherwise, which it is within the competency of the tenure-holder to create. A permanent tenure-holder whether himself having a *mokarari* right or not can create a *mokurari* under-tenure which will be binding on the landlord or the purchaser of the tenure unless annulled under sec. 167 of the B. T. Act: *Tayefa Khatun Choudhurani v. Surendra Kumar Sen Rai*, 59 Cal. 26: 35 C.W.N. 806: A.I.R. 1932 Cal. 165: 133 I.C. 99.

Zuripeshgi lease, if incumbrance.

As to whether a *Zuripeshgi* lease is an incumbrance, see *Gur Sahai Singh v. Meghu Mahlon*, A.I.R. 1935 Pat. 83.

Application for sale of tenure or holding.

162. When a decree has been passed for an arrear of rent due for a tenure or holding, and the decree-holder applies under rule 11 (2) of Order XXI in Schedule I to the Code of Civil Procedure, 1908, for the attachment and sale of the tenure or holding in execution of the decree, he shall produce a statement showing the *pargana*, estate and village in which the land comprised in the tenure or holding is situate, the yearly rent payable for the same and the total amount recoverable under the decree.

Combined order of attachment and proclamation of sale to be issued.

163. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908, when the decree-holder makes the application mentioned in section 162, the Court if it admits the application under rule 17 of Order XXI in Schedule I to the said Code and orders execution of the decree as applied for, shall issue a

combined order of attachment and proclamation in the prescribed form.

(2) The proclamation shall, in addition to stating and specifying the particulars mentioned in rule 66 of Order XXI in Schedule I to the said Code announce—

- (a) in the case of a tenure or holding of a *raiyat* holding at fixed rates, that the tenure or holding will first be put up to auction subject to the registered and notified incumbrances, and will be sold subject to those incumbrances if the sum bid is sufficient to liquidate the amount of the decree and costs, and that otherwise it will, if the decree-holder so desires, be sold on a subsequent day, of which due notice will be given with power to annul all incumbrances; and
- (b) in the case of an occupancy-holding not held at fixed rates, that the holding will be sold with power to annul all incumbrances.

(3) Notwithstanding anything contained in sub-rules (1) and (2) of rule 67 in Order XXI in Schedule I to the said Code, the proclamation shall be published in the following manner—

- (a) by beat of drum at some place on or adjacent to the land comprised in the tenure or holding ordered to be sold and by fixing up a copy thereof in a conspicuous place on such land,
- (b) by affixing a copy thereof in a conspicuous place at the Court-house of the issuing Court,
- (c) by sending in the prescribed form by registered post to the judgment-debtor a concise statement of the order of attachment and proclamation at the time of the issue of the proclamation, and
- (d) in such other manner as may be prescribed.

(4) Notwithstanding anything contained in rule 68 of Order XXI in Schedule I to the said Code the sale shall not, without the consent in writing of the judgment-debtor, take place, until after the expiration of at least thirty days, calculated from the date on which the copy of the proclamation has been fixed up on the

land comprised in the tenure or holding order to be sold.

Application for attachment and sale under s. 163 (2) cl. (a) but use of wrong form and proceedings taken under s. 163 (2) cl. (b), effect of, if rent sale.

1. Sub-sec (2) cl. (a) and cl. (b):—Where the landlord applied for attachment and sale according to the provisions of sec. 163, sub-sec. (2) cl. (a) but through some mistake a wrong form was used and proceedings were taken under sec. 163, sub-sec. (2) cl. (b), and it was stated in the sale proclamation that the sale would be with power to avoid the incumbrances of an occupancy holding though in the sale proclamation and the sale certificate the property was described as *mokurari* interest of the judgment-debtors held, that the sale had the effect of a rent sale under Chap. XIV of the B. T. Act: *Mohendra Nath Banerjee v. Rani Harshamukhi Dassi*, 40 C.W.N. 108. When the incumbrancer himself purchased the property hypothecated to him at a rent sale, it was not necessary for him to give notice of annulment of his incumbrance under sec. 167: *Ibid*.

No notice under Or. 21, r. 66 necessary in execution of rent decree.

2. Or. 21, r. 66:—No notice under Or. 21, r. 66 (2) is required before the sale proclamation is drawn up in proceedings taken in execution of a rent-decree. *Mt. Ila Kuer v. Mir Ali Karim*, A.I.R. 1931 Pat. 267: 133 I.C. 686. See also *Bhudeb Chandra Sarkar v. Asutosh Datta*, A.I.R. 1935 Cal. 76: 153 I.C. 992.

3. Prescribed form:—For concise statement of the proclamation of sale of tenure or holding, see new Form No. 13A, in Appendix VI at the end of this book.

Sale of tenure or holding subject to registered and notified incumbrances, and effect thereof.

164. (1) When tenure or holding at fixed rates has been advertised for sale under section 163, it shall be put up to auction subject to registered and notified incumbrances; and, if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs, including the costs of sale, the tenure or holding shall be sold subject to such incumbrances.

(2) The purchaser at a sale under this section may, in manner provided by section 167, and not otherwise, annul any incumbrance upon the tenure or holding not being a registered and notified incumbrance.

(See notes under secs. 161 and 167.)

Sale of tenure or holding power to avoid all incumbrances, and effect thereof.

165. (1) If the bidding for a tenure or holding at fixed rates put up to auction under section 164 does not reach a sum sufficient to liquidate the amount of the decree and costs as aforesaid, and if the decree holder thereupon desires that the tenure or holding be sold with power to avoid all incumbrances, the officer holding the sale shall adjourn the sale and make a fresh proclamation in accordance with the procedure provided in sub-section (3) of section 163 announcing that the tenure or holding will be put up to auction and sold with power to avoid all incumbrances upon a future day specified therein, not less than fifteen or

more than thirty days from the date of the postponement; and upon that day the tenure or holding shall be put up to auction and sold with power to avoid all incumbrances.

(2) The purchaser at a sale under this section may, in manner provided by section 167, and not otherwise, annul any incumbrance on the tenure or holding.

(See notes under secs. 161 and 167.)

166. (1) When an occupancy-holding not held at fixed rates has been advertised for sale under section 163, it shall be put up to auction and sold with power to avoid all incumbrances.

Sale of occupancy holding with power to avoid all incumbrances, and effect thereof.

(2) The purchaser at a sale under this section may, in manner provided by section 167 and not otherwise, annul any incumbrance on the holding.

(See notes under secs. 161 and 167.)

167. (1) A purchaser having power to annul an incumbrance under sections 164, 165 or 166 or under the Bengal Public Demands Recovery Act, 1913, and desiring to annul the same, may, within one year from the date of the confirmation of the sale or the date on which he first has notice of the incumbrance, whichever is later, present to the Court which passed the decree or the Revenue-officer who made the order, as the case may be, for sale of the property an application in writing requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled.

Procedure for annulling incumbrances, under sections 164, 165 or 166.

(2) Every such application must be accompanied by such fee for the service of the notice as the Board of Revenue may fix in this behalf.

(3) When an application for service of a notice is made in manner provided by this section, the Court or Revenue-officer, as the case may be, shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served.

(4) When a tenure or holding is sold in execution of a decree or a certificate signed under the Bengal Public Demands Recovery Act, 1913, for arrears due in respect thereof, and there is on the tenure or holding a protected interest of the kind specified in section 160, clause (c), the purchaser may, if he has power under

this Chapter or that Act to avoid all incumbrances, sue to enhance the rent of the land which is the subject of the protected interest. On proof that the land is held at a rent which was not at the time the lease was granted a fair rent, the Court may enhance the rent to such amount as appears to be fair and equitable.

This sub-section shall not apply to land which has been held for a term exceeding twelve years at a fixed rent equal to the rent of good arable land.

Headings of Notes.

1. OBJECT OF SEC. 167.
2. INCUMBRANCE.
3. NOTICE.
4. MISCELLANEOUS CASES.

1. Object of S. 167 :—This section is intended to offer a choice to the purchaser of a tenure under a rent-decree either to accept the under-tenure or to avoid it within a year—a period sufficient to enable the purchaser to make up his mind, and if he so desires, to clear the tenure of all incumbrances created upon it by the tenant. If the purchaser does not exercise the right to annul the incumbrances within the time allowed by the law it must be presumed that he intends to adopt the under-tenure or any other incumbrance created upon it by the tenant: *Tayefa Khatun Chaudhurani v. Surendra Kumar Sen Rai*, 59 Cal. 26: 35 C.W.N. 806: 53 C.L.J. 512.

2. Incumbrance :—See notes under s. 161.

3. Notice :—Until the notice has been properly served upon the incumbrancer, the incumbrance subsists and it is obligatory on the purchaser to show that the notice has been served in the manner prescribed: *Rasik Chandra Chakravorty v. Jagabandhu Chakravorty*, A.I.R. 1929 Cal. 392: 131 I.C. 904.

Where at a rent-sale the incumbrancer himself purchases the property hypothecated to him, it is not necessary that any notice should be given under sec. 167 to annul the incumbrance, and the omission to give such a notice does not render the sale subject to the mortgage in question: *Mohendra Nath Banerji v. Harshamukhi Dassi*, 40 C.W.N. 108.

Sec. 167 speaks of "notice" and not "knowledge" and so requires some intimation of a definite character as regards the nature and particulars of the incumbrance to serve as a basis, on which the starting point of the period contemplated by the section may rest. It is also true that knowledge or intimation may sometimes be sufficient to impute notice, if the circumstances are such as may reasonably require a person, who has such knowledge or intimation, to enquire about the particulars: *Gopal Lal Chandra v. Amulya Kumar Sur*, 59 Cal. 911: A.I.R. 1933 Cal. 234: 142 I.C. 747.

A certificate in the order-sheet of the Collector that the notice under sec. 167 of the Act has been properly served is *prima facie*

evidence that such a notice has been served but it is not conclusive. The onus of establishing non-service is on the person who alleges it. It is open to that party to challenge it and show that the notices were not served in time but in the absence of any evidence to the contrary, such a service must be presumed: *Parameshwar Sahu v. Nandkishore Lal*, 11 Pat. 1: A.I.R. 1932 Pat. 123: 136 I.C. 442. Notice under sec. 167 is to be served in a manner provided for service of summons under the C. P. Code: *Ibid*.

Certificate in order-sheet of Collector about service of notice under s. 167, effect of.

The interest of an under-*raiyat*, who held over on the expiry of a lease for a term of 9 years, was liable to eviction as a trespasser without notice under sec. 167 and such an interest is not an incumbrance: *Gopal Chandra Rudra v. Khater Karikar*, 33 C.W.N. 1207.

4. Miscellaneous Cases—A landlord sued his recorded tenants for rent, and having obtained a decree, put up the holding for sale. Plaintiff purchased the holding, obtained possession and annulled interest of an under-tenant by a notice under sec. 167 and sued for recovery of possession. The under-tenant had purchased the interest of one of the recorded tenants at a sale in execution of a money-decree prior to the rent suit, but was not impleaded as a party to the latter suit, as the landlord did not know of the purchase. The sale in execution of the money-decree was not confirmed until after the purchase by the plaintiff. The under-tenure pleaded that as he was not impleaded in the rent suit, the decree was not a rent-decree and that the sale therefore did not pass the entire tenure, *held*, that the tenure itself passed to the plaintiff, and that the purchaser at the sale in execution of the money-decree could not set up his purchase as a shield to defeat the plaintiff's claim: *Ramesh Chandra Guha v. Dinanath Mestari*, 63 Cal. 846: 62 C.L.J. 483: A.I.R. 1936 Cal. 178: 162 I.C. 348.

Annulment of under-tenancy: Whether under-tenant can set up unimpleaded purchaser as a shield against annulment.

Where a mortgagee who purchased the properties in execution did not implead the transferee of the equity of redemption in his mortgage suit, though he was aware of the transfer before he brought his suit and also that there had been no annulment of the mortgage encumbrance under sec. 167, *held*, that a suit for possession by the mortgagee purchaser against the holder of the equity of redemption, subject to the latter's right of redemption was not maintainable: *Mahomed Mehar Talukdar v. Rash Behari Majumdar*, 55 C.L.J. 299: A.I.R. 1932 Cal. 561.

Mortgage encumbrance not annulled, effect of.

An auction-purchaser at a sale of an under-*raiyati* holding having no occupancy right purchases only the right title and interest of the defaulting under-*raiyat* as Chapter XIV does not apply to the holding of such an under-*raiyat*, and as such has no right to annul encumbrances: *Biswanath Rai v. Manik Sarder*, 39 C.W.N. 652.

Rent sale of under-*raiyati* holding without occupancy right, s. 167 not applicable.

168. (1) The Local Government may, from time to time, by notification in the official gazette, direct that occupancy-holdings or any specified class of occupancy-holdings in any local area put up for sale in execution of a decree for an arrear of rent due on them shall, before being put up with power to avoid all incumbrances, be put up subject to registered and notified incumbrances, and may by like notification rescind any such direction.

Power to direct that occupancy holdings be dealt with under sections 159 to 167 as tenures.

(2) While any such direction remains in force in respect of any local area, all occupancy-holdings, or, as the case may be, occupancy-holdings of the specified class in that local area, shall, for the purposes of sale under sections 159 to 167 of this Chapter, be treated in all respects as if they were tenures.

Rules for disposal of the sale-proceeds.

169. (1) In disposing of the proceeds of a sale under this Chapter other than a sale in execution of a decree in a suit instituted under sub-section (1) of section 148A the following rules, instead of those contained in section 73 of the Code of Civil Procedure, 1908, shall be observed, that is to say :—

- (a) there shall first be paid to the decree-holder the costs incurred by him in bringing the tenure or holding to sale;
- (b) there shall, in the next place, be paid to the decree-holder the amount due to him under the decree in execution of which the sale was made;
- (c) if there remains a balance after these sums have been paid, there shall be paid to the decree-holder therefrom the costs of the application under this section and any rent which may have fallen due to him in respect of the tenure or holding between the institution of the suit and the date of the confirmation of the sale;
- (d) the balance (if any) remaining after the payment of the rent mentioned in clause (c) shall, upon the expiration of two months from the confirmation of the sale, be paid to the judgment-debtor upon his application unless the Court for reasons to be recorded in writing otherwise directs :

(2) If the judgment-debtor disputes the decree-holder's right to receive any sum on account of rent under clause (c), the Court shall determine the dispute, and the determination shall have the force of a decree.

I. Object of the Section :—Sec. 169 makes a special provision in favour of the decree-holder in lieu of the general provision in sec. 73, C. P. Code, which makes the proceeds of execution sales liable to rateable distribution among the decree-holder and other creditors of the judgment-debtor who may have obtained other decrees against the judgment-debtor. The period of two months prescribed in sec. 169 is on the face of it meant for the benefit of the landlord who has obtained the rent-decree. The Act itself as a

whole was intended to give simple remedies to the landlord rather than for dealing with the claims of other parties against the tenant: *Inderdeo Tewari v. Ram Ran Bijay Prasad Singh*, A.I.R. 1936 Pat. 164: 161 I.C. 714.

2. Proviso (I): Old Section:—Sec. 169 only applies when the amount payable to the different co-sharers is under the decree passed in the suit. The holder of a simple money decree cannot claim rateable distribution in the sale-proceeds of a holding sold for arrears of rent. Where, however, after a decree for rent by one co-sharer, others also bring similar suits and obtain decrees, the effect is that the amounts mentioned in later decrees are to be held as due. Such decrees are supplementary to the former rent decrees and the case comes under sec. 169, proviso (1): *R. C. Deb v. Lachhmi Prosad Singh*, A.I.R. 1934 Pat. 350: 150 I.C. 970.

S. 169
proviso (1):
old Section.

170. (1) Rules 58 to 63 (both inclusive) of Order XXI in Schedule I to the Code of Civil Procedure, 1908 shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon.

(2) When an order for sale of a tenure or holding in execution of such a decree has been made, the tenure or holding shall not be released from attachment unless, before it is knocked down to the auction-purchaser, the amount of the decree, including the costs decreed, together with the costs incurred in order to the sale, is paid into Court, or the decree-holder makes an application for the release of the tenure or holding on the ground that the decree has been satisfied out of Court.

Tenure or holding to be released from attachment only on payment into Court of amount of decree, with costs, or on confession of satisfaction by decree-holder.

(3) The judgment-debtor, or any person whose interests are affected by the sale, may pay money into Court under this section.

(4) The withdrawal of the amount deposited under this section or section 174 by the decree-holder landlord shall not operate as an admission of the transferability of the tenure or holding sold in execution of the decree.

I. Sub-sec. (I):—The effect of the provisions of this sub-section is that there can be no investigation in execution proceedings, held under Chapter XIV of this Act, of claims by third parties who have interest in the tenure but it does not bar a suit by a transferee of the tenure for a declaration of his title and that the landlord had no right therein to have the tenure sold in execution of an alleged rent decree and for an injunction restraining him from so selling: *Jitendra Nath Ghose v. Monmohon Ghose*, 57 I.A. 214: 58 Cal. 301: 34 C.W.N. 821: 52 C.L.J. 272 (P.C.). The period of limitation for such a suit is 6 years as provided by Art. 120 of the Limitation Act and "the right to sue" accrues when the landlord first applies for the sale of the tenure and not from the date of the passing of the decree: *Ibid.*

Objector claiming title to tenancy attached in execution of rent decree, if can apply under Or. 21 r. 58.

A third party cannot avail himself of Or. XXI, r. 58 against a rent-decree merely on the ground that the tenure or holding in suit belonged to him. Sec. 170 presupposes a rent-decree. A claim may therefore be made under Or. XXI, r. 58 on the ground that a decree is not decree of the kind presupposed in the section, e.g., where the subject-matter of the suit was not a tenure or holding or that the decree was in respect of more than one tenure or holding, or not being the sole landlord of the tenure or holding had failed to observe the special provisions of sec. 148A without which it was impossible for one to obtain a rent-decree. But where the claimant did not deny that the decree-holder was the sole landlord of the holding in suit or that arrears of rent were due in respect of it but merely said that he was the recorded *raiyat* and that the defendants against whom the landlord had proceeded were his (the claimant's) under-*raiyats*, held, that the application under the Or. XXI, r. 58 was incompetent under sec. 170: *Deonandan Prasad v. Pirithi Narayan*, 11 Pat. 790: A.I.R. 1933 Pat. 32: 142 I.C. 40.

S. 170 does not bar claim under Or. 21 r. 58 where decree is not rent decree but money decree.

S. 170, if bars a claim under Or. 21 r. 100.

Sec. 170 does not bar a claim under Or. 21, r. 58, C. P. Code, in a case where the decree obtained by the landlord is, not what is generally known as a rent-decree, but a money-decree. The remedy by a claim under Or. 21, r. 58 is intended to be barred in all cases, in which the holding is put to sale for its own arrears of rent; the only way of preventing the sale from taking place is payment of the decretal amount. Sec. 170 does not exclude a claim by any person interested in the land under Or. 21, r. 100, C. P. Code. So also a person claiming the land adversely to the judgment-debtor can sue for a declaration that the decree is not binding on him or that his interest has not passed by sale: *Surpat Singh v. Shital Singh*, 15 Pat. 614: A.I.R. 1936 Pat. 480: 162 I.C. 805.

2. Sub-sec. (3) :—A mortgagee of an occupancy holding, although he may be an unrecognised co-tenant with the judgment-debtor, is entitled to deposit the decretal amount under sec. 170 of the Bengal Tenancy Act: *Monindra Chandra Ghose v. Ram Nath Samanta*, 41 C.W.N. 983.

A person paying the decretal dues under sec. 170 (3) is in the position of a mortgagee and can retain possession until the debt has been discharged: *Rajeswar Prasad Bhakat v. Rajani Nath Banerji*, 35 C.W.N. 678. See notes under sec. 171.

Amount paid into Court to prevent sale to be in certain cases a mortgage-debt on the tenure or holding.

171. (1) When any person whose interests are affected by the sale of a tenure or holding advertised for sale under this Chapter or in execution of a certificate for arrears of rent due in respect thereof, signed under the Bengal Public Demands Recovery Act, 1913 pays into Court the amount requisite to prevent the sale—

- (a) the amount so paid by him shall be deemed to be a debt bearing interest at twelve *per centum per annum* and secured by a mortgage of the tenure or holding to him;
- (b) his mortgage shall take priority of every other charge on the tenure or holding other than a charge for arrear of rent; and

(c) he shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with the interest due thereon, has been discharged.

(2) Nothing in this section shall affect any other remedy to which any such person would be entitled.

Headings of Notes.

1. ANY PERSON WHOSE INTERESTS ARE AFFECTED BY THE SALE.
2. SUB-SEC. (1), CL. (c).
3. SUB-SEC. (2).
4. MISCELLANEOUS.

1. "Any person whose interests are affected by the sale" :—The words "any person whose interests are affected by the sale" do not include a judgment-debtor. Hence a successor-in-interest of a judgment-debtor is not entitled to the privileges of sec. 171 on depositing the decretal amount: *Kartick Chandra Manna v. Nibaran Chandra Ghose*, 38 C.W.N. 988: A.I.R. 1934 Cal. 832: 152 I.C. 945.

"Any person whose interests are affected by the sale" in s. 171, if includes judgment-debtor.

2. Sub-sec. (1) cl. (c) :—A mortgagee of an occupancy holding, although he may be an unrecognised co-tenant with the judgment-debtor, is entitled to deposit the decretal amount under sec. 170 of the B. T. Act and get possession of the holding under sec. 171: *Manindra Chandra Ghose v. Ram Nath Samanta*, 41 C.W.N. 983.

The validity of the mortgage created by operation of sec. 171 and of the possession delivered to the mortgagee under it, does not depend on the transferability or otherwise of the holding, but it is binding on the landlord even when the holding is not transferable: *Mahomed Zakaria v. Mahomed Nurul Haque*, A.I.R. 1934 Pat. 88: 154 I.C. 388.

3. Sub-sec. (2) :—A person making a payment under sec. 170 (3) is under sec. 171 (1) (c) entitled as a mortgagee to possession until his debt is discharged and as also a further remedy under sec. 171 (2) to sue for the enforcement of the statutory charge after giving up possession. When such a person, in availing himself of the second remedy, brings a suit for the enforcement of his mortgage, he is also entitled to get a decree for accounts: *Rajeswar Prasad Bhakat v. Rajani Nath Banerji*, 35 C.W.N. 678.

4. Miscellaneous :—Where in a suit for arrears of rent one of the co-tenants pays the entire decretal amount and then sues the other co-tenants for contribution it is doubtful whether such person is entitled to claim a charge under sec. 171: *Bhagwan Das v. Akbar Hussain Khan*, A.I.R. 1936 Pat. 571: 165 I.C. 567.

172. When a tenure or holding is advertised for sale

(a) under this Chapter, in execution of a decree against a superior tenant defaulting, or

Inferior tenant paying into Court may deduct from rent.

(b) in execution of a certificate, signed under the Bengal Public Demands Recovery Act, 1913, for arrears of rent due in respect of the tenure or holding from a superior tenant defaulting,

or when such sale is set aside under section 174—

and an inferior tenant pays money into Court in order to prevent or set aside the sale, as the case may be, such inferior tenant may, in addition to any other remedy provided for him by law, deduct the whole or any portion of the amount so paid from any rent payable by him to his immediate landlord; and that landlord, if he is not the defaulter, may, in like manner, deduct the amount so deducted from any rent payable by him to his immediate landlord, and so on until the defaulter is reached.

Decree-holder may bid at sale; judgment-debtor may not.

173. (1) Notwithstanding anything contained in rule 72 of Order XXI in Schedule I to the Code of Civil Procedure, 1908, the holder of a decree in execution of which a tenure or holding is sold under this Chapter may, without the permission of the Court, bid for or purchase the tenure or holding.

(2) The judgment-debtor shall not bid for or purchase a tenure or holding so sold.

(3) When a judgment-debtor purchases by himself or through another person a tenure or holding so sold, the Court may, if it thinks fit, on the application of the decree-holder or any other person interested in the sale, by order set aside the sale and the costs of the application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it shall be paid by the judgment-debtor.

Order under s. 173 (3), if open to appeal.

Sub-sec. (3) : Appeal :—An application by some of the judgment-debtors under sub-sec (3) for setting aside a sale involves a question relating to execution and satisfaction of the decree as between the parties to the suit within the meaning of sec. 47 C. P. C. and is open to an appeal and second appeal: *Parthasarathi Ray v. Ahindra Nath Roy*, 60 C.L.J. 36 : A.I.R. 1935 Cal. 89 : An applicant under sub-sec. (3) is entitled to the benefit of sec. 18 of the Limitation Act. *Ibid.*

A mortgagee of a portion of an occupancy holding is competent to apply to set aside the sale under this sub-section: *Brahm Deo Singh v. Janki Lal*, A.I.R. 1935 Pat. 210 : 154 I.C. 721. Where an applicant purports to apply under Or. 21 r. 90 C. P. C. the Court has power to treat such application as one under sec. 173 B. T. Act as its powers are not fettered by the fact that the party has chosen

to describe his application by a particular label, and the Court is to look to the essence of the whole matter. *Ibid.*

174. (1) Rules 89 and 90 of Order XXI in Schedule I to the Code of Civil Procedure, 1908, shall not apply in cases where a tenure or holding has been sold for arrears of rent due thereon, but in such cases the judgment-debtor or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Court to set aside the sale, on his depositing—

Application
to set aside
sale.

(a) for payment to the decree-holder, the amount recoverable under the decree up to the date when the deposit is made, with costs;

(b) for payment to the auction-purchaser, as penalty a sum equal to five per cent. of the purchase-money, but not less than one rupee.

(2) Where a person makes an application under sub-section (3) for setting aside the sale of his tenure or holding he shall not, unless he withdraws that application, be entitled to make or prosecute an application made under sub-section (1).

(3) Where a tenure or holding has been sold for arrears of rent due thereon, the decree-holder, the judgment-debtor, or any person whose interests are affected by the sale, may, at any time within six months from the date of the sale, apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale :

Provided as follows :—

(a) no sale shall be set aside on any such ground unless the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud; and

(b) no application made by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either deposits the amount recoverable from him in execution of the decree or satisfies the Court, for reasons to be recorded by it

in writing, that no such deposit is necessary.

(4) Rule 91 of Order XXI in Schedule I to the Code of Civil Procedure, 1908, shall not apply to any sale under this Chapter.

(5) An appeal shall lie against an order setting aside or refusing to set aside a sale :

Provided that where the Court has refused to set aside the sale on the application of the judgment-debtor or any person whose interests are affected by the sale and the amount recoverable in execution of the decree is not in deposit in Court, no such appeal shall be admitted unless the appellant deposits such amount in Court.

Headings of Notes.

1. "ANY PERSON WHOSE INTERESTS ARE AFFECTED BY THE SALE".
2. SUB-SEC. (1) : "SETTING ASIDE SALE BY PAYMENT OUT OF COURT."
3. SUB-SEC. (1) : TIME OF DEPOSIT.
4. SUB-SEC. (3), PROVISIO (b) : DEPOSIT WHEN TO BE MADE.
5. SUB-SEC. (3), PROVISIO (b) : "APPLICANT".
6. SUB-SEC. (3) : "FRAUD".
7. SUB-SEC. (5), PROVISIO : RETROSPECTIVITY.
8. SUB-SEC. (5) : DEPOSIT WHEN TO BE MADE.
9. SUB-SEC. (5) : OR. 41, R. 11, C. P. C.
10. SEC. 18, LIMITATION ACT.
11. SUB-SEC. (5) : APPEAL.
12. SUB-SEC. (5) : SECOND APPEAL.
13. REVISION.
14. MISCELLANEOUS.

Decree-holder obtaining order of attachment but property not actually attached before sale, if can apply.
Person obtaining attachment before judgment of property subsequently sold in execution of rent decree, if can apply.

I. "Any person whose interests are affected by the sale" :—

A decree-holder obtaining an order of attachment has a pecuniary interest in the property and is entitled to apply to have a sale of that property in execution of another decree set aside under sec. 174 although the attachment of the property was not actually effected before the date of the sale : *Bulanda Bashini Dassi v. Prangovinda Dhar*, 40 C.W.N. 1334 : 63 C.I.J. 554 : A.I.R. 1936 Cal. 547.

A person who has obtained only an attachment before judgment of a property which is subsequently sold in execution of a rent-decree, but who has not before the date of his application obtained a decree in a suit is not entitled to apply under sec. 174 to have the sale set aside : *Baidyanath Charan Pandey v. Hemlata Dasi*, 40 C.W.N. 759 : A.I.R. 1936 Cal. 26.

A purchaser of a non-transferable occupancy holding [the purchase being before the Bengal Tenancy Amendment Act, 1920, came into force] is entitled to make a deposit under sec. 174 of the Bengal

Tenancy Act and have the sale set aside: *Dayaluddin Sirkar v. Azimuddin Mondal*, 41 C.W.N. 255.

A contingent reversioner under the Hindu Law is entitled to apply for setting aside a sale held in execution of a rent-decree against a Hindu widow: *Susila Sundari Dasi v. Bishnupada De*, 60 Cal. 636: 37 C.W.N. 329. Contingent reversioner, if can apply.

An under-raiyat under an under-raiyat having no occupancy right by custom whose interest is sold for arrears of rent has no *locus standi* to make a deposit of the decretal amount under sec. 174: *Biswanath Rai v. Manik Sardar*, 39 C.W.N. 652. Under-raiyat under an under-raiyat whose interest is sold for arrears of rent, if entitled to make a deposit.

A person who has purchased the interest of an under-raiyat but whose purchase is not valid in law and who is not in possession of the lands has no right to apply under sec. 174 to have a sale of the occupancy holding set aside: *Srish Chandra Mandal v. Bishnupada Mandal*, 42 C.W.N. 1011. S. 174, if bars setting aside of sale on application by decree-holder auction-purchaser on receipt of decretal amount out of Court. Ordinary procedure, if can be varied by parties by agreement.

2. Sub-sec. (1): Setting aside sale by payment out of court
—Sec. 174 lays down the normal procedure to get a sale set aside by making payment of the decree-amount and compensation. But it is an undoubted principle of law that where a court has general jurisdiction, the parties to a proceeding can, by agreement, adopt a different procedure—procedure quite contrary to the ordinary *cursus curiae*, and the court is bound to give effect to such an agreement. Where the decree-holder is himself the auction-purchaser, and if he and the judgment-debtor agree between themselves on the payment of the decretal amount and compensation out of court after the sale that the decree-holder should apply and get the sale set aside, the court has to set aside the sale: *Banga Chandra Majumdar v. Nanda Kumar Majumdar*, 40 C.W.N. 1402. S. 174, if bars setting aside of sale on application by decree-holder auction-purchaser on receipt of decretal amount out of Court. Ordinary procedure, if can be varied by parties by agreement.

The object of the law is that in a summary proceeding for setting aside the sale under the provisions of sec. 174, Bengal Tenancy Act, the Court should not be required to embark upon an inquiry whether the amount due had in fact been paid to the decree-holder. Where it is established either by an admission of the decree-holder or by an application made by him to the court that the amount due to him has been received by him outside the court within thirty days and the judgment-debtor puts in a petition to set aside the sale within thirty days thereof and deposits the compensation money due to the auction-purchaser also within the same time, the court is bound to set aside the sale, because there is a substantial compliance with the provisions of sec. 174 B. T. Act, there being nothing on that date which the judgment-debtor can deposit as “the amount recoverable under the decree” with costs for payment to the decree-holder: *Syed Mahammad Zakiruddin v. Mohammad Nasem*, A.I.R. 1937 Pat. 635: 172 I.C. 13.

A certain holding was sold in execution of a rent-decree. The sale however was set aside on the application of a transferee from the judgment-debtor who came to the Court on the twenty-ninth day after the sale and deposited five per cent of the purchase money for payment to the auction-purchaser and in lieu of depositing in Court under sec. 174 (1), B. T. Act, the amount recoverable under decree with costs for payment to the decree-holder stated by petition that the payment had been made out of Court to the landlord. The landlord decree-holder assented to this statement and to the appli- Decree-holder admitting receipt of his dues outside Court within 30 days—Deposit with in same period by

judgment-debtor of compensation due to auction-purchaser : sale if can be set aside under s. 174.

Failure to deposit deficit amount within time, effect of.

Deposit short by a small amount, but the trial Court treated the deposit as sufficient by mistake, effect of.

Deposit not necessary to be made at the time of application but must be made before application is granted.

cation to set aside the sale, *held*, that the application of the transferee should have been rejected and the parties should have been asked to deposit, if they chose, the amount required by sec. 174, B. T. Act, within the period of limitation: *Hanuman Singh v. Baijnath Prasad Singh*, A.I.R. 1937 Pat. 537 : 172 I.C. 8.

3. Sub-sec. (1) : Time of Deposit :—Under sec. 174 a tenant has only 30 days for the deposit of the decretal amount; and if he does not deposit the full amount within that time he cannot be permitted to deposit the amount of the deficit for setting aside the sale, after the expiry of the time allowed for making up the deficit, by pleading ignorance of the order extending the time for payment. Where a Court accepts such a plea and sets aside the sale under such circumstances, the High Court will interfere in revision and cancel the order setting aside the sale: *Nanda Gopal Sett v. Siraj Mandal*, 60 C.L.J. 578 : 156 I.C. 1007 : where the amount of deposit was short by a very small amount and the Court below made a mistake in treating it as a sufficient deposit and set aside the sale, *held*, that the judgment-debtor could not escape the consequences of making insufficient deposit: *Lachmi Ojha v. Ram Ran Bijoy Prosad Singh*, 13 Pat. 641 : A.I.R. 1934 Pat. 336 : 151 I.C. 618. See however *Abdul Gafur Molla v. Kalidhan Mandal*, 34 C.W.N. 250 where in case of such mistake of Court it was held that the judgment-debtor was entitled to have the sale set aside on paying in the balance.

4. Sub-sec. (3), Proviso (b) : Deposit when to be made—The deposit of the amount recoverable in execution as contemplated by proviso (b) to sub-sec. (3) is for setting aside a sale and is not necessary to be made at the time of making the application. It is only before such an application can be granted that the deposit must be made. The word "allowed" in proviso (b) to sub-sec. (3) means "granted" and is not the same thing as "admitted" occurring in sub-sec. (5) of this section: *Bholanath Roy Choudhury v. Haji Syed Mahamad Mahsud*, 40 C.W.N. 528 : See also *Ajit Kumar Basu v. Surendra Nath Mandal*, 40 C.W.N. 526 : 63 C.L.J. 19 : A.I.R. 1936 Cal. 430 ; *Gunarbinnessa Choudhurani v. Gopendra Prosad Sukul*, 63 Cal. 49 : 39 C.W.N. 1176 : 62 C.L.J. 356 ; *Mafizuddin Muhuri v. Mofizuddin*, 61 Cal. 338 : 38 C.W.N. 334 : 59 C.L.J. 69 A.I.R. 1934 Cal. 491. In the case of *Kulada Prasad Majumdar v. Kumar Prativa Nath Roy*, 62 Cal. 149 : 60 C.L.J. 112 : A.I.R. 1935 Cal. 91 it was held that the word "allowed" in proviso (b) to sub-sec. (3) should be read in the sense "entertained", but this view was not accepted in the above-mentioned cases. In the case in 40 C.W.N. 528, their Lordships, in considering the case in 62 Cal. 149 : 60 C.L.J. 112, remarked as follows:—"The judgment in the case of *Kulada Prasad Majumdar v. Kumar Prativa Nath Roy*, 60 C.L.J. 112, to which I was a party, expressed a doubt as to the correctness of the above view and suggested that the word "allowed" should be read in the sense of "entertained". This, however, was not a decision in that case".

"Applicant" in proviso (b) to sub-sec. (3) : Meaning of.

5. Sub-sec (3), Proviso (b) : "Applicant" :—The word "applicant" in proviso (b) of sub-sec. (3) is applicable both to a "judgment-debtor and to a person, whose interests are affected by the sale", and hence an applicant for having a sale set aside, whether he is a judgment-debtor or any other person, whose interest is affected by the sale, is bound to deposit the amount recoverable

under the decree or to satisfy the Court that no such deposit is necessary: *Mafizuddin Muhuri v. Mofizuddin*, 61 Cal. 338: 40 C.W.N. 334: 59 C.L.J. 69. Where the sale is set aside on the ground of fraud the Court will not order the payment of the decretal amount out of the deposit, whereas if he is innocent it would be equitable that the deposit should be available for the satisfaction of the decree: *Ibid*.

Deposited amount when to be paid to the decree-holder when the sale is set aside.

6. Sub-sec (3) : "Fraud" :—Any fraud antecedent to the decree cannot be a ground for setting aside a sale under sec. 174: *Bindu Bashini Devi v. Prabhat Chandra Sarkel*, 38 C.W.N. 1183: 60 C.L.J. 126.

7. Sub-sec. (5). Proviso: Retrospectivity :—The proviso to sub-sec. (5) has no retrospective effect: *Asikannessa Bibi v. Dwijendra Krishna Dutta*, 58 Cal. 167: 34 C.W.N. 820: A.I.R. 1931 Cal. 92: 129 I.C. 878.

8. Sub-sec (5) : Deposit when to be made :—The deposit of the amount decreed contemplated by sec. 174, cl. (5) of the B. T. Act must be made before the appeal can be entertained at all. The Court has no power to allow an appellant to deposit such sum after the appeal is admitted (i.e., filed and registered) but is not finally disposed of: *Bidhubala Dasi v. Rai Sahib Kumud Nath Das*, 41 C.W.N. 1299: 67 C.L.J. 211. See notes under the heading No. (1) "Sub-sec (3) : Deposit when to be made". An appeal presented on the last day of limitation without making the deposit required by sec. 174 (5) is incompetent, and deposit made after the period of limitation cannot be accepted: *Dakhaja Mohan Roy Chowdhury v. Matiar Rahman*, 42 C.W.N. 646.

Deposit to be made at the time of filing the appeal.

Appeal presented on the last day of limitation without making the deposit, if incompetent.

9. Sub-sec. (5) : Or. 41, r. II, C. P. C. :—It is competent to an Appellate Court to dispose of an appeal preferred under sec. 174 (5), summarily under Or. 41, r. 11, C. P. C. and it is not necessary to give a short judgment stating reasons: *Sheikh Arip v. Brojendra Kishor Roy Choudhuri*, 59 C.L.J. 293: A.I.R. 1934 Cal. 26.

An appeal under sub-sec. (5) s. 174 can be dismissed summarily.

10. S. 18, Limitation Act. :—Sec. 18 of the Limitation Act applies to applications under sec. 174: *Midnapore Zemindari Co., Ltd. v. Priyabala Dasi*, 60 Cal. 970: 37 C.W.N. 927: 57 C.L.J. 377.

II. Sub-sec (5) : Appeal :—There was no appeal from an order under old sec. 174, such order not falling under sec. 47 c.p.c.: *Abdul Gafur Molla v. Kalidhan Mondal*, 34 C.W.N. 250: 50 C.L.J. 532. Under sub-sec. (5) inserted by the Amending Act of 1928 an appeal lies against an order under sec. 174 setting aside or refusing to set aside a sale.

An appeal lies under sub-sec. (5) of sec. 174 against an order dismissing an application for setting aside a sale for default: *Deben-dra Nath Goldar v. Gopal Chandra Das*, 42 C.W.N. 128. See also *Hazi Mohammad Kazibulla Mondal v. Humayun Reza Choudhury*, 42 C.W.N. 612: A.I.R. 1938 Cal. 454.

Order dismissing application for setting aside sale for default, if appealable.

No appeal lies under sec. 174 (5) from an order made under sec. 173 (3) of the B. T. Act: *Ashutosh Mondal v. Gati Krishna Ghosh*, 42 C.W.N. 585.

Appeal, if lies from order under S. 173 (3).

If on the application of a co-sharer landlord for setting aside a sale held in execution of a rent decree of another co-sharer, the Court refuses to set aside the sale but, on the finding that notice under sec. 148A (7) had not been served, observes that the sale is to be considered to be a sale in execution of a money decree, the co-sharer at whose instance the sale was held can and has to proceed against the observation by way of an appeal under sec. 174 (5) and therefore no revision lies: *Khagendra Nath Parui v. Sarat Kumar Das*, 40 C.W.N. 182.

No second appeal lies from order under s. 174.

12. Sub-sec. (5) : Second appeal :—There is no second appeal against an order setting aside a sale under sec. 174 (5) of the B. T. Act. The word "an appeal" in sec. 174 sub-sec. (5) cannot be interpreted as including by implication a second appeal also: *Charles De Sa Fragoso v. Meher Ali*, I.L.R. [1937] 2 Cal. 496: 41 C.W.N. 993 (*where the name of the appellant is Lord Bishop of Mylapur*).

No second appeal against order of dismissal for failure of deposit.

No second appeal lies against the order of dismissal of an appeal for not making the deposit under the proviso to sec. 174 (5): *Kulada Prasad Majumdar v. Kumar Prativa Nath Roy*, 62 Cal. 149: 60 C.L.J. 112.

13. Revision :—A Court setting aside a sale under sec. 174 (3) in the absence of a deposit and without the Court being satisfied that it is unnecessary and without recording any reasons therefor, exercises its jurisdiction with material irregularity justifying interference by the High Court under sec. 115, C.P.C.: *Probodh Chandra Basu v. Kunja Lal Ghosal*, 39 C.W.N. 913: 62 C.L.J. 308. See notes under headings nos. 11 and 12 above.

14. Miscellaneous :—Sale of tenure in execution of rent-decree passed against some of co-sharer tenants—co-sharer tenant so left out joining in compromise petition in execution proceeding whereby sale to be set aside under sec. 174 B. T. Act, if certain money put in—sale set aside but confirmed in appeal in which such co-sharer not made party—such co-sharer not estopped from saying that the sale was not a rent sale: *Narendranath Acharjee v. Hirendranath Acharjee*, 42 C.W.N. 701.

Sale when to become absolute or be set aside, and return of purchase money in certain cases.

174A. (1) Where no application is made under sub-section (1) of section 174 within thirty days from the date of sale or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under sub-section (1) of section 174, the deposit required by that sub-section is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) Where a sale is set aside under this section, the purchaser shall be entitled to an order against any person to whom the purchase money has been paid for its repayment with or without interest as the Court may direct.

(4) No suit to set aside an order made under this section shall be brought by any person against whom such order is made.

(5) Notwithstanding anything contained in this section, an application may be made under sub-section (3) of section 174 to set aside the sale, and where such application is allowed the order made under sub-section (1) confirming the sale shall be deemed to be cancelled.

Sub-sec. (2) Proviso :—Where an order is made setting aside the sale on an application to make the deposit without giving notice of the application as required by proviso to sub-sec. (2), it is good ground for reviewing the order setting aside the sale: *Bhola Nath Chatterjee v. Maharajadhiraj of Burdwan*, 54 C.L.J. 490: A.I.R. 1932 Cal. 265: 137 I.C. 430.

175. *Registration of certain instruments creating incumbrances. Repealed by the Bengal Tenancy (Amendment) Act, 1930 (Ben. Act II of 1930), s. 13.*

176. Every officer who has, whether before or after the passing of this Act, registered an instrument executed by a tenant of a tenure or holding and creating an incumbrance on the tenure or holding, shall, at the request of the tenant or of the person in whose favour the incumbrance is created, and on payment by him of such fee as the Local Government may fix in this behalf, notify the incumbrance to the landlord by causing a copy of the instrument to be served on him in the prescribed manner.

Notification of incumbrances to landlord.

177. Nothing contained in this Chapter shall be deemed to enable a person to create an incumbrance which he could not otherwise lawfully create.

Power to create incumbrances not extended.

CHAPTER XV.

CONTRACT AND CUSTOM.

Restrictions
on exclu-
sion of
Act by
agreement.

178. (1) Nothing in any contract between a landlord and a tenant made before or after the passing of this Act—

- (a) shall bar in perpetuity the acquisition of an occupancy-right in land, or
- (b) shall take away an occupancy-right in existence at the date of the contract, or
- (c) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act, or
- (d) shall take away or limit the right of a tenant, as provided by this Act, to make improvements and claim compensation for them, or
- (e) shall entitle a landlord to recover as rent, from a tenant whose rent is a share, as opposed to a fixed quantity of produce, produce in excess of half the gross produce of the holding for the year for which the rent is claimed, or
- (f) shall take away or limit the rights of an under-*raiyat* as against his immediate landlord, as set forth in Chapter VII, or
- (g) shall take away or limit the right of an occupancy-*raiyat* to transfer his holding or any share or portion thereof in accordance with the provisions of sections 26B to 26G, or
- (h) shall take away or limit the rights of occupancy-*raiyats* in trees on their holdings, as provided in section 23A, or
- (i) shall affect the provisions of section 67 relating to interest payable on arrears of rent.

(2) Nothing in any contract made between a landlord and a tenant since the 15th day of July, 1880, and before the passing of this Act, shall prevent a *raiyat* from acquiring in accordance with this Act, an occupancy-*raiyat* in land.

(3) Nothing in any contract made between a landlord and a tenant after the passing of this Act shall—

- (a) prevent a *raiyat* from acquiring, in accordance with this Act, an occupancy-right in land;
- (b) take away or limit the right of an occupancy-*raiyat* to use land as provided by section 23;
- (c) take away the right of a *raiyat* or under-*raiyat* to surrender his holding in accordance with section 86;
- (d) take away the right of an occupancy-*raiyat* to sub-let subject to, and in accordance with, the provisions of this Act;
- (e) take away the right of a *raiyat* to apply for a reduction of rent under section 38 or section 52;

Provided as follows: —

- (i) nothing in this section shall affect the terms or conditions of a lease granted *bona fide* for the reclamation of waste land, except that, where, on or after the expiration of the term created by the lease, the lessee would, under Chapter V, be entitled to an occupancy-right in the land comprised in the lease, nothing in the lease shall prevent him from acquiring that right;
- (ii) when a landlord has reclaimed waste-land by his own servants or hired labourers, and subsequently lets the same or a part thereof to a *raiyat*, nothing in this Act shall affect the terms of any contract whereby a *raiyat* is prevented from acquiring an occupancy-right in the land or part during a period of thirty years from the date on which the land or part is first let to a *raiyat*;
- (iii) nothing in this section shall affect the terms or conditions of any contract for the temporary cultivation of horticultural or orchard land with agricultural crops.

Explanation.—The expression “horticultural land”, as used in proviso (iii), means garden land, in the occupation of a proprietor or permanent tenure-

holder, which is used *bona fide* for the cultivation of flowers or vegetables, or both, grown for the personal use of such proprietor or permanent tenure-holder and his family, and not for profit or sale.

Amendment :—The words “26G” in clause (g) of sub-sec. (1) were substituted for the words “26J”, and the words “or under-raiyat” after the word “raiyat” in clause (c) of sub-sec. (3) were inserted by the B. T. (Amendment) Act VI of 1938, sec. 34.

Headings of Notes.

1. SUB-SEC. (1), CL. (b) AND CL. (c).
2. SUB-SEC. (1), CL. (f).
3. SUB-SEC. (1), CL. (h) : RIGHTS IN TREES.
4. SUB-SEC. (1), CL. (i) : SEC. 179 : RETROSPECTIVITY.
5. SEC. 178, PROVISO (i) : LEASE FOR RECLAMATION.
6. COMPENSATION.
7. INTEREST ON PUTNI RENT.

1. Sub-sec. (1) cl. (b) and cl. (c) :—Where an under-raiyat had acquired by custom the right of occupancy at the date of the contract on which the plaintiff based his claim for ejectment, held that the contract could not under sec. 178 (c) take away the occupancy-right of the under-raiyat and entitle the plaintiff to eject the under-raiyat upon the contract: *Majidan Bewa v. Basanta Kumar Basu*, 57 C.L.J. 241 : A.I.R. 1933 Cal. 772.

2. Sub-sec (1), cl. (f) :—Sec. 48C, proviso (1) (2), read with sub-sec. (1), cl. (f) of sec. 178, has the effect of taking away the vested right of the landlord under the contract: *Biswambar Chakravorty v. Kalidas Dhupi*, 40 C.W.N. 1275.

Falkar on trees.

3. Sub-sec. (1) : cl. (h) : Rights in trees :—The imposition of *falkar* on the trees standing on an occupancy holding at the inception of the tenancy as a part of the consideration for the use and occupation of the demised land is not prohibited by sec. 178 (h) of the B. T. Act: *Manager, Murshidabad Estate v. Hira Bewa*, 41 C.W.N. 88. See notes under sec. 23A.

Retrospectivity.

4. Sub-sec. (1), cl. (i) : S. 179 : Retrospectivity :—The provisions of secs. 178 and 179 make all stipulations as to payment of interest in excess of $12\frac{1}{2}$ p.c. unenforceable whether the contract was executed before or after the passing of the B. T. Act or whether it relates to a permanent *mokurari* tenure or not: *Purna Chandra Saha v. Hyder Ali Patari*, 54 C.L.J. 215 : A.I.R. 1932 Cal. 88 : 134 I.C. 883. In the case in *Hamiduddin Khan v. Ramani Kanta Roy*, 33 C.W.N. 123 (notes) : 53 C.L.J. 590 the tenant wanted to take advantage of the amendment of the law made during the pendency of the appeal and it was held that the amendment had no retrospective operation. The observation in that case—“I do not find any word either in sec. 178 or anywhere else in the amending Act which gives this amendment retrospective operation” it is submitted with great respect, does not appear to have taken into consideration the words “made before or after” in the general clause introducing sub-sec. (1). The said observation, with reference to the facts of that

Comment.

case, may be interpreted to mean that the amendment did not apply to that case which had been instituted prior to the passing of that Amending Act and not that it has no application to contracts made before the passing of that Act. *See notes under secs. 67 and 179.*

The provisions of cl. (i) of sub-sec. (1) of sec. 178 and sec. 67 apply to *putni* tenures. *See new cl. (e) of sec. 195 inserted by the B. T. (Amendment) Act VI of 1938.*

New law:
S. 67 and
cl. (i) of
sub-sec. (1)
of s. 178
apply to
putni
tenures.

5. S. 178 Proviso (1) : Lease for reclamation :—The stipulation of interest at the rate of one anna per rupee per mensem in a lease for reclamation is valid under sec. 178 proviso (1): *Upendra Nath Das v. Surendra Nath Roy Sircar*, 63 C.L.J. 283.

6. Compensation—A stipulation by a tenant that he will not be entitled to any portion of the compensation on compulsory acquisition of the tenancy is binding on the tenant and is not hit by any of the provisions of sec. 178: *Radhanath Maity v. Krishna Chandra Mukherji*, 40 C.W.N. 720: 63 C.L.J. 72: A.I.R. 1936 Cal. 249.

Stipulation
by tenant
abandoning
all claim
to compen-
sation, if
hit by
s. 178.

7. Interest on Putni rent :—*See notes under secs. 67 and 195.*

179. Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant :

Permanent
mukarrari
leases.

Provided that such proprietor or holder shall not be entitled to recover interest at a rate exceeding that set forth in section 67 or anything that is an *abwab* or the recovery of which is illegal under the provisions of section 74 or sub-section (3) of section 77.

Headings of Notes.

1. PERMANENT MOKARARI LEASE: CONTRACT.
2. PROVISO TO SEC. 179: RETROSPECTIVITY.
3. INTEREST ON PUTNI RENT.
4. PERMANENTLY-SETTLED AREA.

I, Permanent mukarrari Lease : Contract :—Where the tenant, at the time of taking a *mourashi mukarari* lease to which the provisions of sec. 179 were applicable, stipulated by a separate *ekrarnama* that he would surrender the lands and the *mourashi mukarari patta* if, within a certain period fixed, the landlord repaid the amount of *selami* taken by him ; *held*, that the contract was a valid and binding one between the parties and the tenant could not defeat it by setting up an occupancy right: *Shib Narayan Ghose v. Gopal Chandra Ghosh*, 40 C.W.N. 1366.

Contract in
permanent
mukarari
lease that
the tenure-
holder
would
surrender
the land
on repay-
ment of
selami

A permanent tenure-holder having no *mokarari* right can create a *mokarari* under-tenure, which will be binding on the landlord or purchaser of the tenure unless annulled under sec. 167: *Tayefa*

within a
fixed
period, if
valid.

Permanent tenure-holder without *mokurari* right, if can create *mokurari* under tenure.

Interest under the general law when no express or implied contract.

Proviso to s. 179, if retrospective in operation.

Khatun v. Surendra Kumar Sen Rai, 59 Cal. 26: 35 C.W.N. 806: 53 C.L.J. 512.

In the absence of any express or implied contract to the contrary the lessor of a permanent *mokarari* lease is entitled to the benefit of the general law with regard to the payment of interest, that is to say, he is entitled to the benefit of the secs. 67 and 68 of the B. T. Act: *Moinuddin Mirza v. Somendra Kumar Roy*, 13 Pat. 231: A.I.R. 1934 Pat. 153: 147 I.C. 655.

2. Proviso to sec. 179 : Retrospectivity :—The provisions of secs. 178 and 179 make all stipulations as to payment of interest in excess of 12½ p.c. unenforceable whether the contract was executed before or after the passing of the B. T. Act or whether it relates to a permanent *mokarari* tenure or not: *Purna Chandra Saha v. Hyder Ali Patari*, 54 C.L.J. 215: A.I.R. 1932 Cal. 88: 134 I.C. 883. See also *Chundy Charan Law v. Rohini Kumar Sarkar*, 37 C.W.N. 1038: 58 C.L.J. 18: A.I.R. 1934 Cal. 119; *Taraprasanna Roy v. Motaherali Mir*, 60 Cal. 897: 37 C.W.N. 1036: 57 C.L.J. 371, where it was held that the use of the words "*shall not be entitled to recover*" in the proviso to sec. 179 make it clear that the landlord is not entitled to recover by suit interest at the rate exceeding the rate given in sec. 67 notwithstanding any contract, either before or after the passing of the B. T. Act, to pay at a higher rate. See however *Chundy Charan Law v. Abbas Ali Bhuya*, 37 C.W.N. 1170: 58 C.L.J. 93: A.I.R. 1934 Cal. 213, where it was held that the proviso to sec. 179 was not applicable to a *mokarari* lease created before the B. T. Act and where arrears of rent were claimed for a period before the Amending Act of 1928. See notes under secs. 67, 178 and 195.

3. Interest on Putni rent :—See notes under secs. 67 and 195.

4. Permanently-settled Area :—A greater part of the District of Jessore was included in the territory, now known as the Sundarbans: *Tarakeswar Pal Chowdhury v. Kumar Salish Kantha Roy*, 51 C.L.J. 297 (at p. 303).

Utbandi, char and diara lands.

180. (1) Notwithstanding anything in this Act, a *raiya*—

(a) who, in any part of the country where the custom of *utbandi* prevails, holds land ordinarily let under that custom and for the time being let under that custom, or

(b) who holds land of the kind known as *char* or *diara*, shall not acquire a right of occupancy—

in case (a), in land ordinarily held under the custom of *utbandi* and for the time being held under that custom, or

in case (b), in the *char* or *diara* land,

until he has held the land in question for twelve continuous years; and, until he acquires a right of occu-

pancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord.

(2) Chapter VI shall not apply to *raiyyats* holding land under the custom of *utbandi* in respect of land held by them under that custom.

(3) The Collector may, on the application of either the landlord or the tenant or on a reference from the Civil Court, *or after hearing both landlord and tenant, of his own motion*, declare that any land has ceased to be *char* or *diara* land within the meaning of this section, and thereupon all the provisions of this Act shall apply to the land.

I. Amendment :—The words in *italics* "*or, after hearing both landlord and tenant, of his own motion*" after the words "the Civil Court" in sub-sec. (3) were inserted by the B. T. (Amendment) Act VI of 1938, sec. 35.

2. Scope of S. 180 read with secs. 180A and 180B : Fair and equitable rent :—Even if no proceedings be taken under secs. 180A and 180B for the purpose of fixing a uniform annual money rent in respect of *utbandi* lands wherein a right of occupancy has been acquired, under sec. 180 the general liability of an occupancy *raiyyat* to pay a fair and equitable rent will accrue against the *utbandi* tenant as soon as he has acquired such right and a suit under sec. 24 will be directly maintainable. When, however, a suit is brought not under sec. 24 but for an agreed rent, the claim for a fair and equitable rent payable by the *utbandi* tenant as an occupancy-*raiyyat* cannot be considered: *Nafar Chandra Pal Chowdhury v. Jatindra Nath Das*, 57 Cal. 582: 34 C.W.N. 127: 50 C.L.J. 294.

3. Ejectment : Notice :—The ordinary custom regulating *utbandi* tenancies being that the tenant's right to remain on the land does not enure beyond a particular season or particular year, where no special custom to the contrary is proved, an *utbandi* tenant, after the period of agreement has expired, is in no better position than a tenant-at-will. To eject him, when there is no written lease, a verbal demand for possession is sufficient. Incidents of *utbandi* system explained: *Surendra Nath Sarkar v. Baidya Nath Mukherji*, 60 Cal. 681: 37 C.W.N. 335: A.I.R. 1933 Cal. 609: 146 I.C. 55.

4. Diara land :—In the case of *diara* lands where the rent in a particular year varies according to the area under cultivation in that year, the fact that a tenant's entire holding is of a larger area is no obstacle against his landlord getting a decree for rent based upon the smaller area from which crop was actually obtained: *Rai Krishna Bahadur v. Hari Charan Rout*, A.I.R. 1937 Pat. 475: 170 I.C. 783. Rent for
diara land.

180A. (1) Notwithstanding anything contained in section 180, when a *raiyyat* who is or who but for the operation of section 180 in respect of land held under Fixing of
uniform
annual
money

rent in
respect of
utbandi
lands.

the custom of *utbandi* would have been, a settled *raiyat* of the village, holds or has held under the custom of *utbandi*, or under any form of tenancy locally known as *utbandi* land (hereinafter referred to as *utbandi* land), either the landlord or the *raiyat* may apply to have a uniform annual money rent determined for the land.

(2) The application shall include at the discretion of the applicant either—

(a) all *utbandi* lands held in the same village by the same *raiyat* under the same landlord in which the *raiyat* has acquired a right of occupancy whether under the provisions of section 180 or otherwise, or

(b) all the lands held in the same village under the same landlord by the *raiyat* which the *raiyat* or any deceased person whose heir he is, has cultivated as *utbandi* land at any time during the preceding period of six years if he or the said deceased person is the last person to have cultivated the land and has not or had not acquired occupancy-rights therein, or

(c) both.

(3) Subject to the provisions of sub-section (2), a single application may be made by a landlord in respect of lands held as *utbandi* lands in the same village by one or more *rai-yats* under him and a joint application may be made by two or more *rai-yats* in respect of lands held by them as *utbandi* lands in the same village under the same landlord.

(4) The application may be made to the Collector or to a Sub-divisional Officer or to a Revenue-officer appointed by the Local Government under the designation of Settlement Officer or Assistant Settlement Officer for the purpose of making a survey and record-of-rights under Chapter X or to any other officer specially authorized by the Local Government.

(5) The case may be determined by the officer who receives the application, or the Collector or the Settlement Officer may transfer it for disposal to some other officer competent under sub-section (4) to receive applications.

(6) The officer receiving the application or the officer to whom the case is transferred as the case may be, shall cause notice to be given in the prescribed manner to the opposite party, and shall fix a date for the determination of the case.

If the immediate landlord or the *raiyat* is a temporary tenure-holder or *ijaradar*, the officer receiving the application shall also give notice to the superior landlord in the lowest degree, who is a proprietor or permanent tenure-holder.

(7) If the application is made in respect of lands in which the *raiyat* has not acquired occupancy-rights, the officer may reject it in respect of such lands, if he is satisfied in view of all the circumstances of the case that it is unreasonable to grant it :

Provided that a refusal shall be no bar to proceedings being again taken under this section after five years from the date of refusal if in the opinion of the officer who then receives the application the circumstances have in the meantime changed.

(8) If the application is not rejected, the officer shall then determine the sum to be paid as a uniform annual money rent, and also in the case of lands in which the *raiyat* has not acquired occupancy-rights, a premium to be paid to the landlord, and he shall order that the *raiyat* shall, in lieu of paying the rent for the land as *utbandi* land, pay the sum so determined and the premium, if any :

Provided that in any case in which an order fixing a uniform annual money rent is passed *ex parte* the opposite party may within one month of the date of such order or, when the notice has not been duly served, within one month of the date of his knowledge of such order apply to the officer by whom the order was passed for an order to set it aside and, if he satisfies the officer that the notice of the application under sub-section (1) was not duly served on him or that he was prevented by any sufficient cause from appearing when the case was determined, the officer shall *set aside* the order and shall appoint a day for the determination of the case. No order shall be *set aside* on application made under this proviso unless notice thereof has been served on the respondent thereto.

(9) In making the determination of the sum to be paid as rent, the officer shall calculate the average of

the amount that was actually paid or payable as rent for the land for the previous six years and shall ordinarily declare the same as the sum to be paid as rent:

Provided that the officer may also take into consideration—

- (a) the average money rent payable by occupancy-*raiyats* for land of a similar description and with similar advantages in the vicinity ;
- (b) the average rates for lands of a similar description and with similar advantages in the vicinity held as *utbandi* lands ;
- (c) the average money rent payable for lands of a similar description and with similar advantages in the vicinity by *raiyats* who formerly paid their rent for those lands as *utbandi* lands but whose rents have been converted into uniform annual money rents whether under this section or by agreement or otherwise ;
- (d) the charges incurred in accordance with custom by the landlord in respect of the irrigation and drainage of the *utbandi* lands and the arrangements made for continuing those charges ;
- (e) the rules laid down in this Act for the guidance of the Civil Courts in enhancing or reducing rents on account of the holdings of occupancy-*raiyats* ;
- (f) any sum agreed to by the parties to be paid as money rent :

Provided that the officer shall in no case determine a rent which is unfair or inequitable.

(10) The premium to be paid to the landlord in the case of lands in which the *raiyat* has not acquired occupancy-rights shall be three times the rent, or, if the application is made under clause (c) of sub-section (2), three times the portion of the rent determined under sub-section (8) on account of such land.

(11) If the immediate landlord of the *raiyat* is a temporary tenure-holder or *ijaradar* the officer shall apportion the premium payable under sub-section (10) between the said temporary tenure-holder or *ijaradar*

and his superior landlord of the lowest degree who is a proprietor or permanent tenure-holder in such manner as may appear fair and reasonable to the officer in view of all the circumstances of the case, and any sum so awarded to the said superior landlord shall be recoverable by him from the temporary tenure-holder or *ijaradar* or his successor in interest as an arrear of rent but shall not be recoverable by the superior landlord from the *raiyyat*.

(12) The order shall be in writing, shall state the grounds on which it is made, and shall, in the absence of any special reasons to the contrary recorded in writing, take effect from the beginning of the agricultural year next after the date on which it is made.

(13) The officer shall fix the date (not being more than one month from the date of the order) by which the premium shall be paid or he may, on the application of the *raiyyat*, order that the premium shall be paid by instalments not exceeding three in number, that the first instalment shall be paid at the beginning of the agricultural year in which the rent settled under sub-section (8) takes effect and that one of the remaining instalments shall be paid at the beginning of each of the succeeding agricultural years until the premium is paid in full.

(14) The premium or any instalment thereof shall be recoverable as rent, and interest shall not be payable on any instalment in respect of which default has not been made.

(15) Any order made under this section shall be subject to appeal in the manner provided in section 115C unless the application has been made in the course of proceedings under Part II of Chapter X, in which case the provisions of sections 104G and 104H shall apply.

(16) An application made under sub-section (1) may be amended if it appears at any time to the officer prior to the issue of the order under sub-section (7) or sub-section (8) or to the appellate or revisional Court that it does not comply with the provisions of sub-section (2) but that it can be brought into conformity with that sub-section. Such amendment may be made either on the initiative of the parties or either of them or of the officer or Court but it shall not be made unless prior notice thereof is given to the parties, and, if such

amendment is made, it shall be made only on such terms or conditions as to such officer or Court shall appear to be just.

(17) Notwithstanding anything contained elsewhere in this Act or in any other law, no suit shall be brought or application made in any Court in respect of any order passed under this section, save as is provided in this section.

1. Amendment:—*New sub-section (14)* was substituted for old sub-sec. (14) by the B. T. (Amendment) Act VI of 1938, sec. 36.

2. Uniform Annual Money rent : Mode of assessment:—The land to be taken into account in determining rent under sec. 180A is the entire area of the tenancy and the rent for the total quantity of the land comprised in the tenancy. The officer settling rent is to calculate the "average" rent actually "paid" for the cultivable portion and the rent "payable" for the portion, which is not under cultivation. The amount thus determined will be the rent for the land in respect of which the application is made for fixing uniform annual money rent. It was held that the rent of the entire tenancy should be assessed at the current rate arrived at by the Settlement-officer: *Nafar Chandra Pal Chowdhury v. Bhiku Sheikh*, 35 C.W.N. 19: A.I.R. 1931 Cal. 550: 132 I.C. 249. The following of the two different procedures as indicated in sec. 180A in the matter of assessment of uniform annual money rent is permissible: *Ibid.*

Under sub-sec. (9) to sec. 180A it is obligatory on the trial Court to calculate the average of the rent that was actually paid by the tenants for the previous six years: *Badri Narayan Chetlangiya v. Abdul Mandal*, 60 C.L.J. 116: A.I.R. 1935 Cal. 97: 154 I.C. 466.

Although the quantity of *pachan* land in a holding might vary from year to year, there is nothing inequitable to take the *pachan* rate into consideration in fixing uniform rent under sec. 180A: *Srish Chandra Pal Chowdhury v. Rajani Kanta Biswas*, 60 C.L.J. 458: A.I.R. 1935 Cal. 278: 155 I.C. 8r2.

Second
appeal.

3. Sub-sec (15) : Second appeal :—Where the decision involves a fundamental question in connection with a tenancy such as the extent of the area with reference to which rent has to be assessed, the decision is not one merely settling rent and a second appeal is maintainable: *Nafar Chandra Pal v. Bhiku Sheikh*, 35 C.W.N. 19: A.I.R. 1931 Cal. 550: 132 I.C. 249.

A mere decision of the question for how many years the *utbandi* tenant has been an occupancy-*raiyat* would not make the decision an appealable one: *Badri Narayan Chetlangiya v. Abdul Mandal*, 60 C.L.J. 116: A.I.R. 1935 Cal. 97: 154 I.C. 466. Where the Special Judge determined uniform annual money rent in respect of *utbandi* lands with reference to the improvements effected by the landlords and having regard to the land kept fallow by the tenant under the *pachan* system, held that his decision would be one settling rent and was therefore not open to a second appeal: *Srish*

Chandra Pal Chowdhury v. Rajani Kanta Biswas, 60 C.L.J. 458 : A.I.R. 1935 Cal. 278 : 155 I.C. 812.

180B. Whenever an order under section 180A is passed determining a uniform annual money rent for any lands, such lands shall cease to be held as *utbandi* lands with effect from the date from which the new rent takes effect, and the tenant shall hold them as an occupancy-*raiyat* from the date of the order.

Lands in respect of which a uniform annual money rent has been fixed under section 180A to cease to be *utbandi* lands.

180C. (1) Where a uniform annual money rent has been fixed under section 180A, the said rent shall not, except on the ground of a landlord's improvement or of a subsequent alteration of the area of the holding, be enhanced for fifteen years; nor shall it be reduced for fifteen years, save on the ground of alteration in the area of the holding, or on the ground specified in clause (a) of sub-section (1) of section 38.

Period for which rent fixed under section 180A to remain unaltered.

(2) The said period of fifteen years shall be counted from the date on which the order takes effect under sub-section (12) of section 180A.

181. Nothing in this Act shall affect any incident of a *ghatwali* or other service-tenure, or in particular, shall confer a right to transfer or bequeath a service-tenure which, before the passing of this Act, was not capable of being transferred or bequeathed.

Saving as to service-tenures.

Headings of Notes.

1. OCCUPANCY-RIGHT IN SERVICE-TENURES.
2. RESUMPTION OF SERVICE-TENURE.
3. GHATWALI TENURE.

I. Occupancy right in service tenures :—A raiyat, holding under a tenure-holder whose tenure is a service tenure, is not debarred from acquiring occupancy right against his landlord and sec. 181 does not impose on him any such disability : *Anup Mahto v. Mita Dusadh*, 61 I.A. 93 : 13 Pat. 254 : 38 C.W.N. 365 : 59 C.L.J. 147 : 147 I.C. 977 (P.C.). There is a great distinction between the grant of lands on service tenure, revenue or rent free, to a raiyat to cultivate himself in lieu of wages and a grant to a tenure-holder whose emoluments are to be derived from the collection of rents from tenants holding under him as *raiya*ts. In the former case the *raiya*t's grant may well be said to be inconsistent with the acquisition of occupancy rights because the lands are only granted to him so long as he holds the office. Or the other hand the grant to the tenure-holder is in the nature of an assignment of the landlord's right for the duration of the tenure and would not necessarily involve any interference with the *raiya*t's customary rights. *Ibid.*

S. 181, if debars raiyat holding under a tenure-holder having service tenure from acquiring occupancy right. Raiyat granted land on service tenure rent free for

cultivation in lieu of wages, if can acquire occupancy right.

A person holding agricultural land as service tenure, if can acquire occupancy right.

Land of service tenure, when resumable.

Money rent to which service commuted, correct measure of.

Service tenure created before T. P. Act and without any definite contract : ejection. Service tenures burdened with public and private service, distinction between Landlord's right of resumption.

Resumption of chowkidari land.

It is one of the incidents of a service tenure that on refusal to render the services the landlord has a right to resume. This right is specially protected by the provisions of sec. 181—no matter whether the lands are agricultural or not and no matter whether the man who is holding on service tenure actually cultivates it or not. A person holding agricultural land as a service tenure cannot acquire occupancy right therein even though he may cultivate the land himself : *Atul Chandra Roy v. Sarada Sundari Dhupi*, 39 C.W.N. 581 : 61 C.L.J. 143 : A.I.R. 1936 Cal. 49. As to meaning of 'Karsha Chakran', *Ibid*.

2. Resumption of service tenure :—In determining whether land which is the subject-matter of a service grant is resumable at the will of the grantor or not, the distinction to be borne in mind is between the grant of an office to be remunerated by the use of land and the grant of land burdened with service : *Shrimant Lakhamgonda Basavprabhu Sardesai v. Raosaheb Baswantrao alias Anna Saheb Subedar*, 35 C.W.N. 721 (P.C.). In the former case the land will *prima facie* be resumable, in the latter case *prima facie* it will not : but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition : *Ibid*.

When service is commuted to money-rent, the amount of such rent is not at the uncontrolled discretion of the grantor, but has to be reasonable in the circumstances. Where for over fifty years the parties had fixed the rent by reference to the amount of assessment from time to time, *held*, that they had employed a correct measure in the circumstances : *Ibid*.

A service tenure created before the Transfer of Property Act and in respect of which there has not been at any time a definite lease bringing it within one or other of the sub-sections of sec. 111 of the Transfer of Property Act is not governed by that Act at all : *Prokash Chandra Das. v. Rajendra Nath Dass*, 58 Cal. 1359 : 35 C.W.N. 823 : A.I.R. 1932 Cal. 221 : 135 I.C. 296. When the service stipulated for is to a private person, the grantor can always resume possession of a service tenure if the service be no longer required or if the grantee has refused to perform the service. If there is a right to service of a public character such as *chowkidari chakran*, the Zemindar himself is not or may not always be entitled to resume possession : *Ibid*.

A Zemindar is not ordinarily entitled to resume chowkidari lands, because chowkidars have public duties to perform and the lands which they hold on service tenure as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. Even if a Zemindar has been accustomed to demand certain private services from the chawkidar, he would not be entitled to resume the chawkidari land merely because those private services are no longer rendered, so long as the holder of the land is the chawkidar of the village : *Bhagi Mullik v. Satyabadi Ota*, 17 Pat. 315 : A.I.R. 1938 Pat. 507.

Chowkidari Chakran land, resumption of—Village Chowkidari Act (Bengal Act VI of 1870), secs. 58, 59—scope of enquiry under—sec. 61, finality of such order : *The Secretary of State for India v. Chowdhury Biswambhur Das Prohoraj Mahapatra*, 36 C.W.N. 548.

Grant of land to *gorait* in lieu of services is revocable and the Zemindar can at his will remove the *gorait* and appoint another and eject the dismissed *gorait*: *C. J. Shillingford v. Gena Tatma*, A.I.R. 1938 Pat. 141 : 174 I.C. 588. *Gorait* *Jaigir*.

3. Ghatwali tenure:—The ruling power has a customary right, as a necessary incident of a ghatwali tenure to dismiss a ghatwal for misconduct or for non-payment of his dues, and the failure of the ghatwal to obey the statutory duty of paying up the *chaukidari* dues amount to a violation of the terms entitling the govt. to dismiss the ghatwal: *Jogendra Narain Singh v. Radha Prasad Singh*, 17 Pat. 398 : A.I.R. 1938 Pat. 245. Where the ghatwal is hereditary and perpetual, the son or other heir has a recognised right to be appointed a ghatwal provided only that he is fit to discharge his duties and his obligations. *Ibid*.

182. When a *raiyyat* or an under-*raiyyat* holds his homestead otherwise than as part of his holding within the same village or any village contiguous to that village, his status in respect of his homestead shall be that of a *raiyyat* or an under-*raiyyat* according to the status of the landlord of the homestead, and the incidents of his tenancy of such homestead shall be governed by the provisions of this Act applicable to *raiyyats* or under-*raiyyats*, as the case may be. Homesteads

I. "When a raiyat or an under-raiyat holds his homestead" S. 182, if etc. :—When a raiyat holds his homestead otherwise than as a part of his holding, he is entitled, in respect of the homestead, to the benefit of sec. 182, although he may have become a raiyat subsequently to his taking the residential tenancy and although in respect of the latter he may have accepted the *kabuliat* of a tenancy terminable by a notice to quit. *Pulin Chandra Daw v. Abu Bakhar Naskar*, 40 C.W.N. 599 : 67 C.L.J. 59 : A.I.R. 1936 Cal. 565. The word "holds" in the section seems to point to the time when the dispute about the incidents of the tenancy of the homestead arises: *Ibid*. It was held in the case of *Badal Chandra Sadhukhan v. Debendra Nath Dey*, 37 C.W.N. 473 : 58 C.L.J. 325 : A.I.R. 1933 Cal. 612, that sec. 182 does not apply where the tenant had no *rayati* holding at the time the tenancy of homestead was created. S. 182, if applicable to homestead terminable by notice to quit when tenant subsequently acquires status of *raiyyat*.

When a *raiyyat*, being a settled *raiyyat* of a village, acquires occupancy right in a plot of homestead land under sec. 182, but subsequently sells away the agricultural *raiyyati* holding, such sale does not divest him of the occupancy right in the homestead land: *Haru Charan Manna v. Sourendra Nath Ghosh*, 40 C.W.N. 182. See also *Tarak Nath Chakravarti v. Gangadhar De*, 38 C.W.N. 1061. Occupancy right acquired in homestead land by virtue of s. 182, subsequent sale of *raiyyati* holding, effect of. Tenant in respect of homestead acquiring

A tenant holding a homestead in a village subsequently acquired and under-*raiyyati* holding with occupancy right in the same village, but the acquisition was before the amending Act of 1928 came into force, held that sec. 182 applied and the under-*raiyyat* was not liable to ejectment: *Kishore Mohon Deb v. Secretary of State for India*, 41 C.W.N. 405 : A.I.R. 1936 Cal. 528 (where the name of the Appellant is *Kalikumar Deb*).

under-
raiyati
right sub-
sequently,
but before
coming into
force of
the amend-
ing Act of
1928, if
entitled to
the benefit
of s. 182.

S. 182 if
applies to
homestead
within
municipal
area.

Saving of
custom.

Customary
right of
catching
fish.

Sec. 182 applies to the case of a homestead situated within a municipal area, which has not been excluded by a notification under sec. 1 (3) (iii) of the B. T. Act: *Panchanon Chaudhury v. Samatul Chandra Laha*, 41 C.W.N. 1327: A.I.R. 1937 Cal. 695.

The status of a *raiyat* or an under-*raiyat* holding a homestead otherwise than as part of his holding, is under the amended sec. 182 dependent not on the nature of the holding but on the status of the landlord of the homestead: *Rajkumar Mandal v. Shib Chandra Mondal*, 36 C.W.N. 788.

2. Homestead:—Under the general law one of the incidents of tenancy, whether permanent or otherwise, prior to the T. P. Act or B. T. Act, is non-transferability: *Bansi Singh v. Chakradhar Prasad*, 17 Pat. 358: Tenancies of homestead land created before the passing of the T. P. Act are not transferable except by custom: *Kumud Behari Basu v. Himangsu Kumar Ghosh*, 65 C.L.J. 333.

183. Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions.

I. Custom—Customary right of catching fish for commercial purposes on payment of a fixed fee—such right, if can be acquired by prescription: *Rajendra Kishore Roy Chowdhury v. Bama Charan Kaivarta*, 37 C.W.N. 18.

2. Usage:—In the case of an occupancy holding a usage whereby a tenant loses his right to reduction of rent on diluvion under sec. 52 B. T. Act, and to re-occupy the land on its re-formation is a serious derogation of the rights of an occupancy *raiyat*. Therefore such a usage even if it exists is barred by sec. 183, as being expressly or by necessary implication opposed to the provisions of the Act: *Rudra Narain Singh v. Kedar Nath Singh*, A.I.R. 1937 Pat. 458: 170 I.C. 754.

CHAPTER XVI.

LIMITATION.

184. (1) The suits, appeals and applications specified in Schedule III annexed to this Act shall be instituted and made within the time prescribed in that Schedule for them, respectively; and every such suit or appeal instituted, and application made, after the period of limitation so provided shall be dismissed although limitation has not been pleaded.

Limitation in suits, appeals and applications in Schedule III.

(2) Nothing in this section shall revive the right to institute any suit or appeal or make any application which would have been barred by limitation if it had been instituted or made immediately before the commencement of this Act.

Plea of limitation :—Having regard to the provisions of sec. 184 of the B. T. Act the High Court cannot but look into the question of limitation when it has been investigated in the lower Court though not pleaded so early as it ought to have been : *Ram Charan Tripalhi v. Mohan Mohan Jana*, 35 C.W.N. 1143. The onus of showing that a case comes within the special limitation laid down in Schedule III of the B. T. Act is on the person who sets it up. *Ibid.*

High Court, if precluded from considering question of limitation when plea not raised early but matter investigated.

Under sec. 184 a court is bound to dismiss a suit instituted after the period prescribed in Sch. III though limitation has not been pleaded. As to when plea of special limitation can be taken in second appeal in a case where a general plea of limitation was taken in the lower Court : *Gajadhar Rai v. Ramcharan Gope*, 9 Pat. 788 : A.I.R. Pat. 256.

Plea of special limitation, if be taken in second when general plea of limitation taken in lower Court.

185. Sections 6, 7, 8 and 9 and sub-section (2) of section 29 of the Indian Limitation Act, 1908, shall not and, subject to the provisions of this Chapter, the remaining provisions of that Act, shall apply to all suits, appeals and applications specified in Schedule III annexed to this Act.

Portions of the Indian Limitation Act not applicable to such suits, etc., mentioned in Schedule III.

I. Ss. 18 and 20 Limitation Act :—The effect of sec. 185 of the B. T. Act, even before the amendment of the section in 1928 was that secs. 19 and 20 of the Limitation Act did apply to cases under Schedule III of the B. T. Act, even between the years 1922 and 1928. Sec. 29 cl. (2) sub-cl. (b) of the Limitation Act, introduced by the amendment of 1922 merely means that such sections of the Act as are not expressly made applicable by sub-cl. (a) to cases under special or local laws are not to apply to such cases by virtue of the Limitation Act, but that the grounds for applying them are to be sought in the special or local Act itself. The sub-clause does not

intend to cut down anything provided by any special or local law either by express words or by clear intention: *Wazed Ali Khan Pance v. Brojendra Kumar Bandopadhyaya*, 36 C.W.N. 833: A.I.R. 1933 Cal. 90. See also *Hasan Imam v. Brahmdeo Singh*, 9 Pat. 747: A.I.R. 1930 Pat. 301.

2. S. 174:—Sec. 18 of the Limitation Act applies to an application under sec. 174 (4) of the B. T. Act: *Midnapur Zemindary Co. Ltd. v. Priyabala Dasi*, 37 C.W.N. 927: 57 C.L.J. 377.

CHAPTER XVII.

SUPPLEMENTAL.

Penalties.

Penalties.

186. (1) If any person, otherwise than in accordance with this Act or some other enactment for the time being in force, —

Penalties for illegal interference with produce.

(a) distrains or attempts to distrain the produce of a tenant's holding, or,

* * * *

(c) except with the authority or consent of the tenant, prevents or attempts to prevent the reaping, gathering, storing, removing or otherwise dealing with any produce of a holding,

he shall be deemed to have committed criminal trespass within the meaning of the Indian Penal Code.

Act XI, V of 1860.

(2) Any person who abets, within the meaning of the Indian Penal Code, the doing of any act mentioned in sub-section (1), shall be deemed to have abetted the commission of criminal trespass within the meaning of that Code.

Damages for denial of landlord's title.

Damages for denial of landlord's title.

186A. (1) When, in any suit between a landlord and tenant as such, the tenant renounces his character as tenant of the landlord by setting up without reasonable or probable cause title in a third person or himself, the Court may pass a decree in favour of the landlord for such amount of damages, not exceeding ten times the amount of the annual rent payable by the tenant, as it may consider to be just.

Damages for denial of landlord's title.

(2) The amount of damages decreed under sub-section (1), together with any interest accruing due thereon, shall subject to the landlord's charge for rent, be a first charge on the tenure or holding of the tenant ; and the landlord may execute such decree for damages and interest, either as a decree for a sum of money, or in any of the modes in which a decree for rent may be executed.

*Agents and
representatives of
landlords.*

Power for
landlord to
act through
agent.

Agents and representatives of landlords.

187. (1) Any appearance, application or act, in, before or to any Court or authority, required or authorized by this Act to be made or done by a landlord, may, unless the Court or authority otherwise directs, be made or done also by an agent empowered in this behalf by a written authority under the hand of the landlord.

(2) Every notice required by this Act to be served on, or given to, a landlord shall, if served on, or given to, an agent empowered as aforesaid to accept service of or receive the same on behalf of the landlord, be as effectual for the purposes of this Act as if it had been served on, or given to, the landlord in person.

(3) Every document required by this Act to be signed or certified by a landlord, except an instrument appointing or authorizing an agent, may be signed or certified by an agent of the landlord authorized in writing in that behalf.

Action to
be taken
collectively
by co-sharer
landlords
or by their
common
agents
except in
certain
cases.

188. (1) Subject to the provisions of section 148A where two or more persons are co-sharer landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them :

Provided that one or more co-sharer landlords, if all the other co-sharer landlords are made parties defendant to the suit or proceeding in manner provided in sub-sections (1) and (2) of section 148A and are given the opportunity of joining in the suit or proceeding as co-plaintiffs or co-applicants, may—

(i) [*omitted by the B. T. (Amendment) Act VI of 1938, sec. 37*],

(ii) bring a suit for enhancement of the rent of a tenure under section 7 or of a holding under section 30, or for alteration of rent on account of alteration in area under section 52,

(iii) bring a suit for ejectment of a tenant on the grounds specified in section 10, clause (b) of section 18, section 25, or clause (a), clause (b), or clause (c) of section 44, or in

accordance with the provisions of section 48C or section 66,

- (iv) make applications as regards improvements under sections 78, 80 and 81,
- (v) apply for measurement under sections 90 and 91,
- (vi) file an application under section 105,
- (vii) bring a suit under section 106,
- (viii) apply for record of private lands under section 118,
- (ix) apply for the determination of the incidents of a tenancy under section 158,
- (x) apply to the Collector for a declaration under sub-section (3) of section 180.

(2) Any decree passed or order made in a suit or proceeding in which the conditions set forth in sub-section (1) of this section have been complied with, shall have the effect of a decree passed or order made, on the application of the sole landlord or the whole body of landlords, and shall take effect as regards the whole tenure or holding, as the case may be :

Provided that where a suit is brought under section 7 or section 30 for enhancement of rent, or under section 52 for alteration of rent, or where an application is made under section 105 by a co-sharer landlord for settlement of rent, the Court or Revenue-officer, as the case may be, when the rent has been fixed or settled, shall distribute any amount by which the rent has been increased or reduced between the co-sharer landlords of the tenancy in proportion to their respective shares in such tenancy whether they have or whether they have not joined as plaintiffs or applicants, and such distribution shall be binding on all the co-sharer landlords as if they had all sued or applied for the same, and for the purposes of any appeal, application or suit in regard to such distribution they shall be deemed to have sued or applied under sub-section (1) of this section together with co-sharer plaintiff or applicant.

[**Amendment** :—*Clause (i) in the proviso to sub-section (1) : "file an application under sub-sec. (1) of sec. 26F or under sec. 26J" was omitted by the B. T. (Amendment) Act VI of 1938, sec. 37].*

Headings of Notes.

1. SUB-SEC. (1) PROVISO (i) : APPLICATION UNDER SEC. 26F.
2. SUB-SEC. (1) PROVISO (ii) : ADDITIONAL RENT FOR ADDITIONAL AREA.
3. SUB-SEC. (1) PROVISO (iii) : EJECTMENT.
4. ASSESSMENT OF RENT.

I. Sub-sec (I) Proviso (i) : Application under s. 26F:—

See notes under sec. 26-F. An application for pre-emption by some co-sharers is not maintainable where the other co-sharers are not impleaded within the period of limitation even though co-sharers who are impleaded subsequent to such period state that they had no wish to purchase the land: *Rajanee Kanta Saha v. Atul Chandra Seal*, 60 Cal. 787 : A.I.R. 1933 Cal. 636 : 145 I.C. 836 : (This proviso has been omitted by the B. T. (Amendment) Act VI of 1938).

S. 188, if retrospective in operation.

2. Sub-sec. (I) Proviso (ii) Additional rent for additional area :—Sec. 188 as amended by the Amending Act of 1928 is not retrospective in operation so as to apply to a pending suit for additional rent under sec. 52: *Jagamohan Ghose v. Behari Barui*, 39 C.W.N. 1006.

S. 188 not applicable to a suit by co-sharer landlord for additional rent on the basis of contract.

Sec. 188 has no application to a suit by some of the co-sharer landlords for additional rent for additional area when it is not under sec. 52 but on the basis of a kabuliyat executed in their favour: *Prasanna Kumar Mistri v. Sudhangsu Kumar Roy Choudhury*, 39 C.W.N. 538.

S. 188, if applies to suit for ejectment of under-*rayat* whose term has expired.

3. Sub-sec (I) Proviso (iii) : Ejectment :—Sec. 188 does not apply to a suit for ejectment of an under-*rayat* whose term has expired inasmuch as such a suit is one to eject a trespasser, the bringing of which is not required or authorised by the B. T. Act but is authorised by the general law: *Jasada Kumar Roy Choudhury v. Abdul Rahaman*, 61 Cal. 962 : 38 C.W.N. 841 : 59 C.L.J. 528. See also *Lachmi Lal v. Ganesh Chamar*, A.I.R. 1932 Pat. 259 : 140 I.C. 14.

A co-sharer landlord who had made the other co-sharer landlords *proforma* defendants was competent to maintain a suit for ejectment and get a decree for possession to the extent of his share, jointly with the *proforma* defendants: *Jerman Gomez v. Ram Kumar Kaibarta*, 58 C.L.J. 133.

Suit for assessment of fair and equitable rent, if s. 188 applicable.

4. Assessment of rent :—A suit to have fair and equitable rent assessed is consistent with and arises out of the general law and is not one which the landlord is required or authorised to do under sec. 188: *Gour Sundar Majumdar v. Krishna Kamini Chaudhurani*, 54 C.L.J. 74 : A.I.R. 1932 Cal. 41. A decree for rent or damages for use and occupation can be passed in a suit for assessment of rent if the possession of the tenant is admitted or proved and there is no bar of limitation. *Ibid*.

188A. (*Procedure in suits by joint landlords.*)
Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), sec. 120.

Rules under Act.

Rules under Act.

189. The Local Government may, from time to time, by notification in the official Gazette, make rules, consistent with this Act,—

Power to make rules regarding procedure, powers of officers and services of notices.

(1) to regulate the procedure to be followed by Revenue-officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer—

(a) any power exercised by a Civil Court in the trial of suits;

(b) power to enter upon any land, and to survey, demarcate and make a map of the same and any power exercisable by any officer under the Bengal Survey Act, 1875; and

Ben. Act V of 1875.

(c) power to cut and thresh the crops on any land and weigh the produce, with a view to estimating the capabilities of soil; and

(2) to prescribe the forms to be used, and the mode of service of notices issued, under this Act, where no form or mode is provided in this or any other Act;

(3) to prescribe the manner in which the landlord's fee shall be transmitted to the landlord;

(4) to prescribe the authority by whom the fees, deposited under sections 12, 13, 15, 17 and 18, may be declared to be forfeited, and the mode in which such fees, when so forfeited, shall be dealt with; and

(5) to provide for all or any of the following matters, namely—

(a) the manner of publication of—

(i) notifications under sub-section (3) of section 1;

(ii) price lists under sub-section (3) of section 39;

(iii) notices under sub-section (2) of section 87;

(iv) the draft record-of-rights under sub-section (1) of section 103A;

- (v) the record-of-rights under sub-section (2) of section 103A;
- (vi) Tables of Rates under sub-section (2) of section 104B;
- (vii) the draft Settlement Rent-roll under sub-section (1) of section 104E;
- (viii) proclamation under clause (d) of sub-section (3) of section 163; and
- (ix) the rules made by authorities other than the Local Government or the High Court under sub-section (2) of section 190;
- (b) the manner of payment of the landlord's fee under sub-section (4) of section 12;
- (c) *the amount of fees—*
 - (i) *for processes referred to in sub-section (2) of section 12, in sub-sections (1), (2), (3), (4) and (5) of section 26C, in sub-section (6) of section 26G, in sub-section (2) of section 85A and in sub-section (2) of section 88;*
 - (ii) *for service of notice referred to in sub-section (1) of section 13; and*
 - (iii) *referred to in sub-section (2) of section 61 and in sub-section (6) of section 88.*
- (d) the amount of the cost of transmission of fess or other monies;
- (e) the manner of payment or tender of rent by postal money-order;
- (f) the manner of verification of applications under sub-section (2) of section 80;
- (g) the information to be contained in the applications referred to in sub-section (2) of section 80;
- (h) the form of the register referred to in clause (a) of sub-section (2) of section 99A and the particulars to be therein entered;
- (i) the manner of making a survey and preparing a record-of-rights under sub-section (4) of section 101;

- (j) the particulars referred to in the proviso to clause (j) of section 102;
- (k) the period of publication of the draft record-of-rights under sub-section (1) of section 103A and of the draft Settlement Rent-roll under sub-section (1) of section 104E;
- (l) the manner in which objections shall be considered and disposed of under sub-section (2) of section 103A;
- (m) the empowering of the "confirming authority" referred to in sub-section (4) of section 104B;
- (n) the superior Revenue authority referred to in section 104G;
- (o) the stamp to be borne by applications under sub-section (1) or sub-section (2) of section 105;
- (p) [*Omitted by the B. T. (Amendment) Act VI of 1938, s. 38*];
- (q) any other matter required or permitted under this Act to be prescribed.

I. Amendment :—*New sub-clause (c) in clause (5) was substituted for old sub-clause (c) by the B. T. (Amendment) Act VI of 1938, sec. 38. Sub-clause (p) was omitted by the same Act. The words "or the landlord's transfer fee" and the word "and" in clause (3) were omitted, and the words "and 18" in clause (4) were substituted for the words "18, clause (a), 26C, 26E and 48H" and the word 'and' at the end of the said clause was inserted by the said Act. The words "and of the landlord's transfer fee and costs of transmission under sub-section (7) of section 26C" in sub-clause (b) of clause (5) were omitted by that Act.*

2. Process fee for notices on Respondents in appeal before Special Judge :—Process fee for notices on Respondents to an appeal before the Special Judge must be paid according to the scale laid down in the High Court Rules framed under sec. 20 of the Court Fees Act and not according to r. 65, Chapter VIII of the Rules framed by the Government under sec. 189 of the B. T. Act: *Charusila Dasi v. Government Pleader, Birbhum*, 35 C.W.N. 253.

190. (1) Every authority having power to make rules under any section of this Act shall, before making the rules, publish a draft of the proposed rules for the information of persons likely to be affected thereby.

Procedure
for making,
publication
and con-
firmation
of rules,

(2) The publication shall be made, in the case of rules made by the Local Government or High Court, in such manner as may, in its opinion, be sufficient for giving information to persons interested, and, in the case of rules made by any other authority, in the prescribed manner :

Provided that every such draft shall be published in the official Gazette.

(3) There shall be published with the draft a notice specifying a date, not earlier than the expiration of one month after the date of publication, at or after which the draft will be taken into consideration.

(4) The authority shall receive and consider any objection or suggestion which may be made by any person with respect to the draft before the date so specified.

(5) The publication in the official Gazette of a rule purporting to be made under this Act shall be conclusive evidence that it has been duly made.

(6) All rules made under this Act may, from time to time, subject to the sanction (if any) required for making them, be amended, added to or cancelled by the authority having power to make the same.

Notes:—*As to draft of the proposed amendments in the Bengal Government Rules, see Appendix V at the end of this book.*

*Provisions
as to tem-
porarily-
settled
districts.*

*Settlement
of rent of
land held
in a dis-
trict not
permanently
settled.*

Provisions as to temporarily-settled districts.

191. Where the area comprised in a tenure or holding is situate in an estate not subject to a subsisting permanent settlement and when,

(a) land-revenue is for the first time made payable in respect of the land, or

(b) land-revenue having been previously payable in respect of it, a fresh settlement of land-revenue is made,

nothing in this Act or in any lease or contract made after the passing of the Bengal Tenancy Act, 1885, shall entitle any tenant to hold his tenancy free of rent or at a particular rent, unless in the case of a fresh settlement made under clause (b) the right so to hold beyond the term of the previous settlement has been expressly recognised at the previous settlement by a Revenue authority empowered by Govern-

ment* to make definitely or confirm settlements, and the Revenue-officer may, notwithstanding anything in the contract between the parties, by order, on the application of the landlord or of the tenant, or of his own motion, fix a fair and equitable rent for all grades of tenants in accordance with the principles laid down in sections 6, 7, 8, 9, 27 to 36, 38, 39, 43, 50 to 52 and 180 :

Provided that, notwithstanding anything contained in sub-section (3) of section 7 he may divide the minimum profit of ten *per centum* provided for in that sub-section among two or more grades of tenure-holders if such exists.

I. Scope :—S. 191 of the B. T. Act contemplates that a lease or contract after the passing of that Act may be superseded only where the area comprised in the tenure or holding to which the contract relates is situate wholly in an estate not subject to a subsisting permanent settlement. When a Zemindar grants a *mokarari* lease in respect of lands comprising his *asli* lands and *diara* lands accreted to his estate at a consolidated rental, his contract is not affected when the Revenue-officer settles the rent payable by the *makuraridar* of the *diara* portion under s. 104 of the B. T. Act and the Government settles the *diara* lands as a temporarily settled estate with the said zemindar. It is open to the *makurraridar* to show that he holds one tenancy comprising bigger area at a consolidated rental. The *mokurrari* lease is not hit by s. 191 of that Act : *Srish Chandra Nandi v. Midnapur Zemindary Co., Ltd.*, (1938) 2 Cal. 41 : 67 C.L.J. 202.

2. Crown grant : Sunderbans :—Waste lands of the Sunderbans granted on behalf of the Secretary of State for India in Council by Sunderbans Commissioner are crown grants and governed by the provisions of the Crown Grants Act (XV of 1895). Any restrictive covenant in such grant is valid notwithstanding any law statutory or otherwise. The Crown Grants Act has no application to grants of *Khasmahal* lands where the Secretary of State occupies the position of a private proprietor : *Jnanendranath Nanda v. Jadunath Banerji*, I.L.R. [1938] 1 Cal. 626. Waste lands in Sunderbans : Crown grant.

192. (*Power to alter rent in case of new assessment of revenue.*) Amalgamated with section 191 by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 122.

Rights of pasturage, etc.

193. The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything

Rights of pasturage, etc.
Rights of pasturage, forest-rights, etc.

* The words "Provincial Government" have been substituted for the word "Government" by the Government of India (Adaptation of Indian Laws) Order 1937.

payable or deliverable in respect of any rights of pasturage, forest-right, rights over fisheries and the like.

I. "Rights over fisheries":—Where right of fishery had been granted in respect of two pieces of land, surrounded on all sides by embankment, and described in the lease as "*bheri jami jalkar*", held, that the expression "rights over fisheries", in sec. 193 includes also the user of land for the purpose of fishing or for the purpose of repairing embankments in the interest of fishing. The special rule of limitation provided for by sections 184 and 185 of the said Act applies to a case like this: *Nani Lal Mandal v. Priya Nath Roy*, 56 Cal. 1170.

Fishery :
Boundary
dispute :
Rennel's
Map.

Although Rennel's Map cannot claim absolute accuracy for the exact provision of the mouzas and although for defining the boundaries of *mouzas* or estates its accuracy is still less, it may very properly be used for fixing a spot on the bank of the river in order to define the boundary to *jalkars*: *Kumar Pramatha Nath Roy v. Nani Lal Roy*, 41 C.W.N. 748 (P.C.).

Suit to
realise
money due
on settle-
ment by
auction of
date and
palm trees,
if comes
under
s. 193.

2. "Forest right and the like":—Money due on a settlement by auction of date and palm trees, under which the settlement holder obtains the right to collect the juice of the trees for the season, does not amount to rent, and a suit to realise such money is cognisable by the Small Cause Court and is governed by Art. 110 of the Limitation Act. Such a suit is not one between landlord and tenant and does not come under s. 193 of the B. T. Act: *Kameshwar Singh v. Mahabir Pasi*, 15 Pat 626: A.I.R. 1936 Pat. 403.

Savings for
conditions
binding on
landlords.

Tenant not
enabled by
Act to
violate
conditions
binding on
landlord.

Savings for conditions binding on landlords.

194. Where a proprietor or permanent tenure-holder holds his estate or tenure subject to the observance of any specified rule or condition, nothing in this Act shall entitle any person occupying land within the estate or tenure to do any act which involves a violation of that rule or condition:

Provided that this section shall not apply to a *raiyat* or an under-*raiyat* doing any act in exercise of of the rights conferred by this Act upon *raiyats* or under-*raiyats*, as the case may be.

Savings for
special
enactments.
Savings for
special
enactments.

Savings for special enactments.

195. Nothing in this Act shall affect—

- (a) the powers and duties of Settlement-officers as defined by any law not expressly repealed by this Act;
- (b) any enactment regulating the procedure for the realization of rents in estates belonging

to the Government, or under the management of the Court of Wards or of the Revenue authorities;

- (c) any enactment relating to the avoidance of tenancies and incumbrances by a sale for arrears of the Government revenue;
- (d) any enactment relating to the partition of revenue-paying estates;
- (e) *any enactment relating to patni-tenures in so far as it relates to those tenures, except that—*
 - (i) *the provisions of section 67 and of clause (i) of sub-section (1) of section 178 shall apply to all patni-tenures, and*
 - (ii) *the expression 'khudkast raiyat or resident and hereditary cultivator' in sub-section (3) of section 11 of the Bengal Patni Taluks Regulation, 1819, shall be deemed to include all raiyats having a right of occupancy; or**
- (f) any other special or local law not repealed either expressly or by necessary implication by this Act.

1. Amendment:—New clause (e) was substituted for old clause (e) by the B. T. (Amendment) Act VI of 1938, s. 39, cl. (ii).

2. Effect of Amendment:—*Interest on Putni rent is now governed by sec. 67 of the B. T. Act. See notes under sec. 67. Putni rent: Before the Amending Act VI of 1938, interest on Putni rent was regulated by the terms of the engagement between the parties and not by s. 178 or the proviso to s. 179 of the B. T. Act: Samser Ali Choudhury v. Mohammad Hossein Taluqdar, 41 C.W.N. 605; Monoranjan Rai v. Selamuddin Ahmed Chaudhuri, 39 C.W.N. 1003; 61 C.L.J. 346.* *Interest on Putni rent: Act VI of 1938. S. 195 (e) (i).*

3. Cl. (e) (ii) : Raiyat having right of occupancy:—This clause as amended by the Amending Act of 1928 does not apply to a suit instituted before the said amendment came into force. Under s. 11 cl. (3) of the Patni Regulation read with s. 195 of the B. T. Act as stood before the said amendment of 1928 a raiyat having a right of occupancy only was liable to be evicted: *Samsuddin Ahmed v. Suresh Chandra De*, 39 C.W.N. 1270: 61 C.L.J. 369.

***Note.**—This portion (ii) is not new. It was inserted in the old cl. (e) by the Amending Act IV of 1928. Now it has been numbered as cl. (e) (ii) by the Amending Act VI of 1938.

*Protection
for certain
acts.*

*Protection
in certain
cases for
acts done.*

Protection for certain acts.

195A. No suit or other proceeding shall be instituted against the Secretary of State for India in Council or against any officer of the Government* in respect of anything done by the registering officer, the Collector or the Court in regard to the receiving, distribution or payment of the landlord's fee or the landlord's transfer fee :

Provided that nothing in this section shall prevent any person entitled to receive the amount of any such landlord's fee or landlord's transfer fee or any portion thereof from recovering the same from a person to whom it has been paid by the Collector or the Court.

196. (*Act to be read subject to Acts hereafter passed by Lieutenant-Governor of Bengal in Council.*)
Repealed by the Bengal Tenancy (Amendment) Act, 1928 (Ben. Act IV of 1928), s. 125.

* The word "Crown" has been substituted for the words "Secretary of State for India in Council" and "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

SCHEDULE I

(See section 2.)

REPEAL OF ENACTMENTS.

Regulations of the Bengal Code.

Number and year.	Subject of Regulation.	Extent of repeal.
8 of 1793 ...	A Regulation for re-enacting with modifications and amendments the rules for the Decennial Settlement of the public revenue payable from the lands of the <i>zamindars</i> , independent <i>talukdars</i> and other actual proprietors of land in Bengal, Bihar and Orissa, passed for those Provinces, respectively, on the 18th September, 1789, the 25th November, 1789, and the 10th February, 1790, and subsequent dates.	Sections 51, 52, 53, 54, 55, 64 and 65.
12 of 1805 ...	A Regulation for the settlement and collection of the public revenue in the <i>zila</i> of Cuttack including the <i>parganas</i> of Pataspur, Kamardachor and Bhograï, at present included in the <i>zila</i> of Midnapore.	Section 7.
5 of 1812 ...	A Regulation for amending some of the rules at present in force for the collection of the land revenue.	Sections 2, 3, 4, 26 and 27.
18 of 1812 ...	A Regulation for explaining section 2, Regulation 5, 1812, and rescinding sections 3 and 4, Regulation 44, 1793, and sections 3 and 4, Regulation 50, 1795, and enacting other rules in lieu thereof.	The preamble and sections 2 and 3.
11 of 1825 ...	A Regulation for declaring the rules to be observed in determining claims to lands gained by alluvion or by dereliction of a river or the sea.	In clause 1 of section 4, from and including the words "Nor if annexed to a subordinate tenure" to the end of the clause.
6 of 1862 ...	An Act to amend Act 10 of 1859 (to amend the law relating to the recovery of rent in the Presidency of Port William in Bengal).	The whole Act.
4 of 1867 ...	An Act to explain and amend Act 6 of 1862, passed by the Lieutenant-Governor of Bengal in Council, and to give validity to certain judgments.	The whole Act.

(Schedule I.—Repeal of Enactments.)

Number and year.	Subject of Regulation.	Extent of repeal.
8 of 1869 ...	An Act to amend the Procedure in suits between landlords and tenants.	The whole Act.
8 of 1879 ...	An Act to define and limit the powers of Settlement-officers. <i>Act of the Governor General in Council.</i>	The whole Act.
10 of 1859 ...	An Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal.	The whole Act.

SCHEDULE II

PARTICULARS OF RECEIPT AND OF STATEMENT OF ACCOUNT.

(See sections 56 and 57.)

Particulars of receipt (landlord's portion).	Particulars of receipt (tenant's portion).
1. Serial number of receipt.	1. Serial number of receipt.
2. Name of village, pargana, thana.	2. Name of village, pargana, thana.
3. (a) Name of the estate and <i>tauzy</i> number to which the land appertains, and (b) (If the landlords are not the proprietors) name, if any, of the tenure or holding of the landlords.	3. (a) Name of the estate and <i>tauzy</i> number to which the land appertains, and (b) (If the landlords are not the proprietors) name, if any, of the tenure or holding of the landlords.
4. Name or names of the landlord or landlords and the nature of their interest.	4. Name or names of the landlord or landlords and the nature of their interest.
5. Tenant's name.	5. Tenant's name.
6. Particulars of the tenure or holding for which rent is paid,— (a) Serial number of the landlords' rent-roll, and if a record-of-rights has been prepared, serial number of the tenancy in it.	6. Particulars of the tenure or holding for which rent is paid,— (a) Serial number of the landlord's rent-roll, and if a record-of-rights has been prepared, serial number of the tenancy in it.

(Schedule II.—Particulars of receipt and of statement of account.)

Particulars of receipt
(landlord's portion).

(b) Area.

(c) Annual rent (cash or fixed quantity of produce or both as the case may be).

(d) Annual road and public works cesses.

(e) *Jalkar*, *bankar* and *phalkar*.

7. Amount paid, specifying for which of the items (c), (d) and (e) and for which year and *kist*.

8. Date of payment.

9. Signature of landlord or his authorized agent.

Particulars of receipt
tenant's portion).

(b) Area.

(c) Annual rent (cash or fixed quantity of produce or both as the case may be).

(d) Annual road and public works cesses.

(e) *Jalkar*, *bankar* and *phalkar*.

7. Amount paid, specifying for which of the items (c), (d) and (e) and for which year and *kist*.

8. Date of payment.

9. Signature of landlord or his authorized agent.

Particulars of statement of account.
(Landlord's portion.)

1. Serial number of receipt.

2. Name of village, pargana, thana.

3. (a) Name of the estate and *tauzi* number to which the land appertains, and

(b) (If the landlords are not the proprietors) name, if any of the tenure or holding of the landlords.

4. Name or names of the landlord or landlords and the nature of their interest.

5. Tenant's name.

6. Particulars of the tenure or holding for which rent is paid,—

(a) Serial number of the landlords' rent-roll, and if a record-of-rights has been prepared, serial number of the tenancy in it.

(b) Area.

Particulars of statement of account.
(Tenant's portion.)

1. Serial number of receipt.

2. Name of village, pargana, thana.

3. (a) Name of the estate and *tauzi* number to which the land appertains, and

(b) (If the landlords are not the proprietors) name, if any of the tenure or holding of the landlords.

4. Name or names of the landlord or landlords and the nature of their interest.

5. Tenant's name.

6. Particulars of the tenure or holding for which rent is paid,—

(a) Serial number of the landlords' rent-roll, and if a record-of-rights has been prepared, serial number of the tenancy in it.

(b) Area.

(Schedule II.—Particulars of receipt and of statement of account.)

Particulars of statement of account.
(Landlord's portion.)

(c) Annual rent (cash or fixed quantity of produce or both as the case may be).

(d) Annual road and public works cesses.

(e) *Jalkar, bankar and phalkar.*

7. Amounts due at the beginning of the year :—

(a) under each of the items (c), (d) and (e) and for which years; and

(b) as interest on above.

8. Amounts paid during the years against each of the above dues, with dates of payment and serial number of the rent-receipt granted.

9. Amounts remaining due at the end of the year.

10. Date of the statement of account.

11. Signature of landlord or his authorized agent.

Particulars of statement of account.
Tenant's portion.)

(c) Annual rent (cash or fixed quantity of produce or both as the case may be).

(d) Annual road and public works cesses.

(e) *Jalkar, bankar and phalkar.*

7. Amounts due at the beginning of the year :—

(a) under each of the items (c), (d) and (e) and for which years; and

(b) as interest on above.

8. Amounts paid during the years against each of the above dues, with dates of payment and serial number of the rent-receipt granted.

9. Amounts remaining due at the end of the year.

10. Date of the statement of account.

11. Signature of landlord or his authorized agent.

SCHEDULE III

LIMITATION.

(See section 184.)

PART I.—Suits.

Description of suit.	Period of limitation.	Time from which period begins to run.
1. To eject any tenure-holder, <i>raiyyat</i> or under- <i>raiyyat</i> on account of any breach of a condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach.	One year	The date of the breach.

(Schedule III.—Limitation.)

Description of suit.	Period of limitation.	Time from which period begins to run.
1 (a) To eject a non-occupancy- <i>raiyyat</i> or under- <i>raiyyat</i> on the ground of the expiration of the term of his lease.	Six months.	The expiration of the term.
2. For the recovery of an arrear of rent in a suit brought by— (i) a sole landlord, (ii) the entire body of landlords, or (iii) one or more co-sharer landlords— (a) when the arrear fell due before a deposit was made under section 61 on account of the rent of the same tenure or holding. (b) in other cases ...	Six months Three years	The date of the service of notice of the deposit or presentation of the postal money-order, as the case may be. The last day of the agricultural year in which the arrear fell due.
3. To recover possession of land claimed by the plaintiff as a <i>raiyyat</i> or an under- <i>raiyyat</i> .	Two years	The date of dispossession.

PART II.—APPEALS.

Description of appeal.	Period of limitation.	Time from which period begins to run.
4. From any decree or order under this Act, to the Court of a District Judge or Special Judge.	Thirty days	The date of the decree or order appealed against.
5. From any order of a Collector under this Act, to the Commissioner.	Thirty days	The date of the order appealed against.

PART III.—APPLICATIONS.

Description of application.	Period of limitation.	Time from which period begins to run.
6. For the execution of a decree or order made in a suit between landlord and tenant to whom the provisions of this Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, exclusive of any interest which may have accrued after decree upon the sum decreed, but inclusive of the costs of executing such decree; except where the judgment-debtor has by fraud or force prevented the execution of the decree, in which case the period of limitation shall be governed by the provisions of the Indian Limitation Act, 1908: Provided that, where a sale in execution for arrears of rent is set aside on application, the proceedings in execution shall continue and the time between the date of such sale and the date of the order setting it aside shall be excluded from the period of limitation provided by this Article.	Three years	(1) The date of the decree or order; or, (2) where there has been an appeal, the date of the final decree or order of the Appellate Court; or (3) where there has been review of judgment, the date of the decision passed on the review.

SCHEDULE III—ART. 1 & 1(a)

Description of suit.	Period of limitation.	Time from which period begins to run.
1. To eject any tenure-holder, <i>raiyat</i> or under- <i>raiyat</i> on account of any breach of a condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach.	One year	The date of the breach.
1(a). To eject a non-occupancy- <i>raiyat</i> or under- <i>raiyat</i> on the ground of the expiration of the term of his lease.	Six months.	The expiration of the term.

Sch. III Art I: Breach of covenant:—In a suit for ejectment for breach of covenant against alienation, when the lessee transferor does not appeal against the decree in ejectment, the trans-

feree from the lessee cannot plead limitation by calling to his aid Art. 1, of Sch. III to the B. T. Act and the landlord is entitled to eject the transferee: *Thakur Dayal Singh v. Pramatha Nath Mitra*, 15 Pat. 673: A.I.R. 1936 Pat. 493.

Sch. III Art I (a) : Ejectment of non-occupancy raiyat: "Lease" in Sch. III, Art. 1 (a), meaning of.
 —Sch. III, Art. 1 (a), providing the period of limitation for a suit to eject a non-occupancy raiyat on the ground of the expiration of the term of his lease is to be read along with sec. 44: *Ambika Prasad v. Achambit Thakur*, 9 Pat. 405: A.I.R. 1930 Pat. 378. The word "lease" as used in Art. 1 (a) must be taken to refer to a registered lease: *Ibid*.

SCHEDULE III—ART. 2.

Description of suit.	Period of limitation.	Time from which period begins to run.
2. For the recovery of an arrear of rent in a suit brought by—		
(i) a sole landlord,		
(ii) the entire body of landlords, or,		
(iii) one or more co-sharer landlords—		
(a) when the arrear fell due before a deposit was made under section 61 on account of the rent of the same tenure or holding.	Six months.	The date of the service of notice of the deposit or presentation of the postal money-order, as the case may be.
(b) in other cases ...	Three years.	The last day of the agricultural year in which the arrear fell due.

Headings of Notes.

1. SUIT FOR RENT IN RESPECT OF LEASE OF AGRICULTURAL LAND FOR NON-AGRICULTURAL PURPOSE.
2. PUTNI RENT.
3. SUIT FOR CESS.
4. RENT FOR FISHERY.

I. Suit for rent in respect of lease of agricultural land for non-agricultural purpose.—Where the lease is merely for collection of rents and there is no question of the lessee being required or

Suit for rent in respect of

lease for non-agricultural purpose though of agricultural land, if Sch. III, Art. 2 applies.

Suit for rent on registered lease coming under B. T. Act, if governed by Sch. III, Art. 2.

Suit for recovery of excess cess and damages in respect of *Putni* on contract if governed by Sch. III, Art. 2.

Suit for recovery of double the amount of cess under s. 58 of the Cess Act, if governed by Sch. III, Art. 2 of the B. T. Act.

Comment.

expected to bring any land under cultivation either himself or by members of his family or by servants or labourers or by establishing tenants on the land it is not one for agricultural purpose, although the lands may be agricultural or tenanted by cultivating tenants, and it is governed by the T. P. Act. A suit for arrears of rent on such a lease, when it is registered, is governed by Art. 116 of the Limitation Act and not by Sch. III, Art. 2 of the B. T. Act: *Munshi Alaaddin Ahammed Choudhury v. Tomijuddin Ahammed*, [1937] 2 Cal. 631: 41 C.W.N. 1001: A.I.R. 1937 Cal. 587. As to whether Sch. III, Art. 2 will be applicable even where the lease comes under the B. T. Act, if it is in writing registered: *Ibid*.

2. Putni Rent:—Sch. III, Art. 2 applies to suits for arrears of *Putni* rent brought under the B. T. Act: *Wazed Ali Khan Panee v. Brojendra Kumar Bandopadhyaya*, 36 C.W.N. 833.

3. Suit for cess:—A suit for recovery of excess cess in respect of *Putni* mahal together with damages on the basis of certain terms in a *kabuliyat* under which the defendant holds the same is a suit for recovery of rent and not for recovery of money: *Mohanta Bhagaban Das v. Bhupendranarayan Sinha*, 60 Cal. 587: 57 C.L.J. 120. The word "*rajswa*" is wide enough to include cess payable under the Cess Act: *Ibid*.

A suit for recovery of double the amount of cess under s. 58 of the Cess Act was held to be an ordinary money claim and not an arrear of rent and hence governed by the rule of 3 years' limitation in the case of *Rani Bhuneswari Kuer v. Maharaj Gopal Saran Narayan Singh*, 8 Pat. 358: 33 C.W.N. 128 (notes). It is submitted with great respect that this decision did not correctly lay down the law. The provisions of s. 64A of the Cess Act under which all sums due under the provisions of Chapter IV (which includes s. 58) can be recovered as if it were due on account of rent and *subject to the same rules of limitation*, were not considered in this case. *In view of the provisions of sec. 64A such a suit, it is submitted, will be governed by Sch. III, Art. 2 of the B. T. Act.*

4. Rent for fishery:—In a suit brought for recovery of arrears of rent in respect of fishery right over two pieces of *bheri* land where there was a liability to repair embankments in the interest of fishing, held, that the case is covered by the expression "Rights over fisheries" provided in sec. 193 of the B. T. Act and the special rule of limitation provided in Schedule III Art. 2 applies to the case: *Nani Lal Mandol v. Priya Nath Roy*, 50 C.L.J. 19.

SCHEDULE III—ART. 3.

Description of suit.	Period of limitation.	Time from which period begins to run.
3. To recover possession of land claimed by the plaintiff as a <i>raiyat</i> or an under- <i>raiyat</i> .	Two years	The date of dispossession.

Headings of Notes.

1. OBJECT OF ART. 3.
2. DISPOSSESSION.
3. DISPOSSESSION BY LANDLORD AS LANDLORD OR AUCTION-PURCHASER.
4. WHERE ART. 3 APPLIES AND WHERE NOT.
5. EXTINCTION OF RIGHT AFTER TWO YEARS.
6. ONUS.

1. Object of Art 3 :—The idea which induced the Legislature to enact the special provision of limitation in the B. T. Act was to benefit the landlord by enabling him to give security of his right to let out the land if the old tenant does not claim to be reinstated within two years from dispossession. It was also intended to settle disputes between landlord and tenant as speedily as possible. It being a special provision intended for the benefit of the landlord, it overrides the general provisions of the Limitation Act and it does not exonerate a mortgagee or other transferee of the holding from bringing the suit within two years: *Mohim Chandra Basak v. Kanai Lal Saha*, 33, C.W.N. 1085 : A.I.R. 1930 Cal. 311. *Object of enacting Art. 3.*

2. Dispossession.—Art. 3 does not speak of dispossession by the landlord. It prescribes the period of two years within which a suit by a raiyat or an under-raiyat must be brought for recovery of his holding. But as the B. T. Act is an enactment relating to the relationship between the landlord and the tenant the suit in which that Article applies must be a suit by the tenant against his landlord. There is nothing in the law to show that such a suit must be by a tenant against the entire body of landlords: *Mohim Chandra v. Kanai Lal Saha*, 33, C.W.N. 1085 : A.I.R. 1930 Cal. 311. *"Dispossession" in Art. 3, means dispossession by the landlord.*

In order to make Art. 3 applicable it must be proved that the landlord had a hand in the dispossession: *Hriday Nath Roy v. Probodh Chandra Khan*, 60 Cal. 1171 : 37 C.W.N. 1148 : 57 C.L.J. 549. See also *Shiv Saran Rai v. Sukhdeo Rai*, A.I.R. 1937 Pat. 418 : 171 I.C. 317 : *Khondkar Kasem Ali v. Hriday Nath Mandal*, 60 C.L.J. 42 : A.I.R. 1935 Cal. 142.

Where the raiyat was dispossessed by the landlord although he did not directly effect the dispossession himself but it was effected by a servant set up as a tenant then in a suit by the raiyat to recover possession, Art. 3 Schedule III of the B. T. Act applies: *Bindeshwari Rai v. Ram Palak Singh*, A.I.R. 1938 Pat. 181 : 175 I.C. 91. It is not necessary that the dispossession must be by the landlord himself or by his hired servant. If the landlord authorises a third person by making settlement of the land with him to dispossess a tenant and that person armed with the settlement dispossesses the tenant, the dispossession is by the landlord and Art. 3 applies: *Har Dayal v. Nathuni*, A.I.R. 1935 Pat. 372 : 158 I.C. 21. See notes under headings nos. 3 and 4. *Dispossession effected by servant of the landlord, if Art. 3 applies.*

3. Dispossession by landlord as landlord or auction-purchaser :—The rule of special limitation under Art. 3 Schedule III, that a tenant must bring a suit for recovery of possession within two years from the dispossession by the landlord is not excluded when the landlord dispossesses as an auction-purchaser in execution of a money-decree and takes delivery of possession through Court. *Art. 3 if applies where dispossession is by landlord as auction-purchaser :*

Usufructuary mortgagees from the tenant who were in possession at the time of such dispossession are equally affected by the rule: *Sheikh Alam v. Atul Chandra Ray*, 40 C.W.N. 173: A.I.R. 1936 Cal. 299: 163 I.C. 84. (*Satis Chandra v. Hassem Ali*, 54 Cal. 450: 31 C.W.N. 634 followed). See also *Jogendra Nath Sen v. Mahima Das*, 34 C.W.N. 358: A.I.R. 1930 Cal. 450. It is not necessary that the dispossession must be by the landlord as such or by the entire body of landlords or that each one of the co-sharer landlords is to plead special limitation. *Ibid.* An order under sec. 145 C. P. C. is admissible in evidence of the fact as to who was declared entitled to retain possession against all persons when the fact of the possession on the date of the order has to be ascertained, but as between the parties to the proceedings such an order is also admissible as evidence as regards possession before two months of the date of the order. *Ibid.*

Conflict of case law.

A contrary view has been taken in the case of *Gosta Behari Pramanick v. Amiya Kumar Das*, 63 Cal. 503: 40 C.W.N. 135: 165 I.C. 135, where it has been held that dispossession effected by the act of delivery of possession by the Court is not dispossession by the landlord within the meaning of Art. 3 of Schedule III of the B. T. Act (the case of *Kamaldhari Thakur v. Rameshar Singh*, 17 C.W.N. 817 was followed). This question came up for decision before a *Full Bench* of the Patna High Court in the case of *Wazihunessa v. Banke-Behari Singh*, A.I.R. 1930 Pat. 177 but it was not decided as it was held that it did not arise for decision upon the facts of the case. This question again came up for decision before a *Full Bench* of the Patna High Court in the case of *Gajadhar Rai v. Ram Charan Gope*, 9 Pat. 788: A.I.R. 1930 Pat. 256 and it was held that Art. 3, Schedule III does not apply if the dispossession is by the landlord as an *auction-purchaser* of the hoding. The case in 40 C.W.N. 135, 40 C.W.N. 173 and 9 Pat. 788 were considered in the case of *Amiruddin Sarkar v. Nissaruddin Sarkar*, A.I.R. 1938 Cal. 276: 175 I.C. 697 where, relying on the cases in 40 C.W.N. 173 and 54 Cal. 450: 31 C.W.N. 634, it was held that dispossession by the landlord as *auction-purchaser* does come under the provisions of the special law of limitation under Art. 3, Schedule III of the B. T. Act. Where a tenant in execution of a mortgage decree against his co-sharer tenants obtains their rights in the land, he represents the tenancy and when he is dispossessed by the landlord the rule of special limitation would apply: *Ibid.*

Reappearance of land after submergence: Landlord getting possession under s. 145 Cr. P. C., if Art. 3 applies.

4. Where Art 3 applies and where not :—In order to attract the special limitation prescribed by Art. 3, Schedule III, the dispossession of the tenant must be by the landlord or at his instance. If the possession of the tenant ceased on account of the land being submerged under water, and after re-appearance of the land there was no actual taking of possession by the tenant and no dispossession by the landlord, Art. 3 does not apply. An order under sec. 145 Cr. P. Code made between rival claimants does not amount to a dispossession by the landlords. Nor does an order of attachment under sec. 146 Cr. P. Code have that effect: *Jurwan Singh v. Ramsarekh Singh*, 12 Pat. 261: A.I.R. 1933 Pat. 224: 149 I.C. 561. See also *Rudra Narain Singh v. Kedarnath Singh*, A.I.R. 1937 Pat. 458: 170 I.C. 754; *Har Dayal v. Nathuni*, A.I.R. 1935 Pat. 372: 158 I.C. 21.

Art. 3 can be made applicable only where the dispossession has been effected by the landlord or by his agent. Dispossession implies the coming in of a person and the driving out of another from possession, while discontinuance implies going out of the person in possession and his being followed into possession by another. Where on discontinuance of possession by a tenant of non-transferable occupancy holding some of the co-sharer landlords take khas possession of the holding, there is no dispossession by them so as to attract the operation of Art. 3: *Rakhal Das v. Khirode Bandhu*, 51 C.I.J. 36: A.I.R. 1930 Cal. 247.

Discontinuance of possession by the tenant: Possession by landlord, if Art. 3 applies.

In order to attract application of Schedule 3, Art. 3, the dispossession must be by the landlord and the mere fact that the land stood recorded in the *gair mazrua khata* of the landlord does not show that the tenant was dispossessed by the landlord. The entry in the record-of-rights neither creates nor extinguishes rights: *Bankey Behari Lal v. Gudo Choudhury*, A.I.R. 1930 Pat. 476. As to whether on the determination of the period of limitation prescribed by Art. 3 the right of title in the property will also be extinguished. *Ibid*.

Entry in record-of-rights.

When one party is on the land, and the landlord settles the same with another party by taking a *kabuliyat* from him and the latter thereafter dispossesses the party on the land, the dispossession is dispossession by the landlord. Such dispossession by the superior landlord of the heirs of a deceased under-raiyat by settling the land with a third person is dispossession not merely of those heirs who are trespassers but also of the raiyat and Art. 3, Schedule III of the Bengal Tenancy Act would apply to a suit by the raiyat for ejectment of such third person: *Abdul Latif v. Hamed Guzi*, 60 Cal. 1082: 38 C.W.N. 61: A.I.R. 1933 Cal. 898: 148 I.C. 1177.

Heirs of deceased under-raiyat dispossessed by person who obtained settlement from superior landlord: Suit by raiyat for ejectment of such person, if governed by Art. 3:

A suit by a reversioner to recover possession of land which the widow surrendered to the landlord and which the landlord having kept in his khas possession till some time after the widow's death settled with a third party the Plaintiff being thus never in actual possession, is governed by Schedule III, Art. 3 and is time-barrred if brought after 2 years from the widow's death: *Nanda Lal Saha v. Saileshnath Bishi*, 38 C.W.N. 539: A.I.R. 1934 Cal. 617. (The case of *Srish Chandra Bhaduri v. Brojobashi Pramanik*, 48 C.I.J. 554: A.I.R. 1929 Cal. 157 distinguished).

Dispossession by person obtaining settlement from landlord, if dispossession by landlord. Art. 3, if applies to suit by reversioner for recovery of land surrendered by widow to landlord and settled by latter with third party.

Where a reversioner has not entered into possession at all after the death of the widow the special limitation under Art. 3 is not applicable: *Nanhu Singh v. Dip Kuer*, A.I.R. 1934 Pat. 61: 146 I.C. 342.

A suit by a Hindu reversioner for possession of raiyati land on the death of the widow who was dispossessed by the landlord, is not governed by Art. 3, Schedule III, B. T. Act; *Manilal Jha v. Nath-sahay Singh*, 9 Pat. 634. The word 'dispossession' in the said article refers to dispossession of the plaintiff or of a person through whom the plaintiff claims.

Two years after the property was sold in execution of a rent decree and formal delivery was given, a suit was brought alleging that the decree under which the property was sold was not a rent decree but a money decree, and so the property was not liable to be sold, the defendants pleaded limitation, but the plaintiffs alleged that

the landlord obtained decree secretly and the formal delivery was given without his knowledge and that he was dispossessed long after formal delivery was given in consequence of case under sec. 107, Cr. P. Code, *held*, that the special law of limitation would not apply to this case: *Jobeda Khatun v. Sheik Monabali*, A.I.R. 1930 Cal. 479.

Where in a suit by a tenant for possession of his holding it was found that the landlord had no hand in dispossessing the plaintiff and he recognised the defendant as a tenant after he had entered into the land on his own account and had kept the plaintiff out of possession, the suit is governed by the rule of 12 years' limitation and not by the special limitation of two years provided for in Schedule III, Art. 3: *Ramdhari Rai v. Gorakh Rai*, 10 Pat. 264: A.I.R. 1931 Pat. 236: 133 I.C. 34.

Dispossession of raiyat by landlord for 2 years, if extinguishes raiyat's title or merely bars his remedy under Sch. III, Art. 3.

5. Extinction of right after two years:—If a landlord keeps a raiyat out of possession of his holding for the period mentioned in Art. 3, Schedule III, then not only is the latter's remedy barred, but his title is extinguished also, on general principles, if not under sec. 28 of the Limitation Act. If thereafter the raiyat somehow re-secures possession within 12 years from dispossession, he is not remitted to his old title: *Nalini Bhusan Roy v. Hirralal Roy*, 33 C.W.N. 1077. See also *Chaturbhuj Singh v. Sarada Charan Guha*, 11 Pat. 701: A.I.R. 1933 Pat. 6: 141 I.C. 157.

6. Onus:—The language of Art. 3, Schedule III is the same as Art. 142, Limitation Act and therefore the onus is upon the plaintiff to prove that dispossession took place within two years. It is not sufficient merely to prove title coupled with enjoyment at some earlier period: *Badrinath Upadhyaya v. Baijnath Mandal*, A.I.R. 1930 Pat. 134: 123 I.C. 612.

PART II.—Appeals.

SCHEDULE III—ARTS. 4 & 5.

Description of appeal.	Period of limitation.	Time from which period begins to run.
4. From any decree or order under this Act, to the Court of a District Judge or Special Judge.	Thirty days	The date of the decree or order appealed against.
5. From any order of a Collector under this Act, to the Commissioner.	Thirty days	The date of the order appealed against.

PART III.—Applications.

SCHEDULE III—ART. 6.

Description of application.	Period of limitation.	Time from which period begins to run.
<p>6. For the execution of a decree or order made in a suit between landlord and tenant to whom the provisions of this Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, exclusive of any interest which may have accrued after decree upon the sum decreed, but inclusive of the costs of executing such decree; except where the judgment-debtor has by fraud or force prevented the execution of the decree, in which case the period of limitation shall be governed by the provisions of the Indian Limitation Act, 1908: Provided that, where a sale in execution for arrears of rent is set aside on application, the proceedings in execution shall continue and the time between the date of such sale and the date of the order setting it aside shall be excluded from the period of limitation provided by this Article.</p>	Three years	<p>(1) The date of the decree or order; or,</p> <p>(2) where there has been an appeal, the date of the final decree or order of the Appellate Court; or</p> <p>(3) where there has been review of judgment, the date of the decision passed on the review.</p>

Headings of Notes.

1. ADJUSTMENT OF DECREE BY AGREEMENT: EXECUTION.
2. TRANSFER OF DECREE.
3. ART. 6 PROVISIO.

1. Adjustment of decree by agreement : Execution :—Where a decree for rent is adjusted by means of an agreement between the parties, which provides that the decree-holder would be entitled to execute the decree in terms of the agreement, an application for execution of that decree must be made within 3 years of the date of the decree and not of the agreement adjusting the decree. An application filed after 3 years of the date of the original decree is barred. It is not open to the parties to extend by their agreement the period of limitation: *Sarada Prasad Ghosh v. Rokeya Khatun Bibi*, 39 C.W.N. 1036. As to whether when a decree is thus adjusted an application for execution would lie or the agreement should be enforced by a suit. *Ibid*.

2. Transfer of decree :—Where an application for execution was filed in the transferring Court before transfer of the decree, it is not necessary to file a fresh application for that purpose in the transferee court. An application to have a decree transferred to another court though not an application for execution is a step-in-aid of execution, *held* in the circumstances of the case that the application for execution of the decree was not barred under Schedule III, Art. 6 : *Sreenath Chakravarti v. Priyanath Bandopadhyaya*, 52 C.L.J. 569.

3. Art 6 Proviso :—The two parts of this proviso should be read together and so read it means that the decree-holder shall, at the end of the period of time during which the sale was in full effect, be in just the same position he was in before the sale took place, provided there is no further break in the continuity due to his own inaction. Normally the period of limitation for pursuing execution is 3 years from the date of the decree or the date of the appeal as the case may be. But if in the course of that period a sale has taken place, and subsequently that sale has been set aside, the intervening period is not to be counted, if he then desires to go on with the execution. Otherwise, the total period of time within which the decrec-holder must set in motion proceedings for enforcing his decree is a period of three years. Where, therefore, the decrec-holder makes an application for reviving the execution proceeding one month after the order setting aside the sale, and more than three years after the relevant point of time as provided for in the third column of Art. 3, the application is time-barred : *Siddeswar Ghose v. Panchanan Bangal*, 42 C.W.N. 485 : A.I.R. 1938 Cal. 390.

APPENDICES

- I. Statement of Objects and Reasons for the B. T. (Amendment) Bill, 1937.
 - II. Report of the Select Committee of the Bengal Legislative Council on the Bengal Tenancy (Amendment) Bill, 1937.
 - III. The Governor's Message to the Legislature.
 - IV. The Bengal Tenancy Ordinance, 1938.
 - V. Proposed Amendments in the Bengal Government Rules.
 - VI. Bengal Government Notification.
 - VII. Bengal Government Press Note, dated the 4th November, 1938, regarding Deposit of Landlord's Transfer Fees.
 - VIII. The Bengal Tenancy (*Second Amendment*) Bill, 1938, for Amendment of Sec. 68.
 - IX. The Bengal Tenancy (*Third Amendment*) Bill, 1938, for Amendment of Sec. 52.
 - X. The Bengal Rates of Interest Bill, 1938.
 - XI. Extracts from the Assembly Proceedings and Council Debates on the Bengal Tenancy (Amendment) Bill, 1937.
 - XII. Terms of Reference to the Bengal Land Revenue Commission, 1938.
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APPENDIX I

Statement of Objects and Reasons for the Bengal Tenancy (Amendment) Bill, 1937.

[Published in the Calcutta Gazette Extraordinary, August 27, 1937,
at p. 234]

Some of the existing provisions of the Bengal Tenancy Act have been found to operate rather harshly on the cultivators. The object of this Bill is not to attempt a radical reform of the existing system of land tenure, but to lessen the burden on the cultivator by making the amendments to the law which appear to be most urgently required.

Among the leading provisions of the Bill will be found the following :—

1. Abolition of landlord's transfer fees and the right to pre-emption.
2. Repeal of Chapter XIII-A which allows landlords the use on certain conditions of the certificate procedure for realising their rents.
3. Giving under-*raiyats* the right to surrender their holdings.
4. Imposing summary penalty for the exaction of *abwabs*.
5. Empowering Government to suspend any or all of the provisions of the Act relating to the enhancement of rent.
6. Giving powers of surrender to tenure-holders.
7. Allowing landlords to sue for a portion of their arrears of rent instead of for the whole amount.
8. Allowing structures solely for religious purposes to be erected on holdings on certain conditions.
9. Giving increased facilities for the sub-division of tenures and holdings.
10. Providing for the suspension or abatement from rent when a tenure or holding is lost by diluvion.
11. Reducing the rate of interest on arrears of rent from 12 per cent to 6¼ per cent.
12. Giving occupancy under-*raiyats* the same rights of transfer as occupancy-*raiyats*.
13. Giving facilities to occupancy-*raiyats* to regain possession, under certain conditions, of mortgaged holdings.

(Sd.) B. P. SINGH ROY,
Member-in-Charge.

By order of the Governor
(Sd.) H. D. BENJAMIN,
Secretary to the Govt. of Bengal.

CALCUTTA,
The 25th August, 1937.

APPENDIX II

**Report of the Select Committee of the Bengal Legislative Council
on the Bengal Tenancy (Amendment) Bill, 1937.**

[Published in the Calcutta Gazette, March 17, 1938.]

We, the members of the Select Committee to which the Bengal Tenancy (Amendment) Bill, 1937, was referred by a motion carried in the Council, have the honour to submit this our report with the Bill embodying amendments recommended by us.

For the purpose of dealing with the matters before us expeditiously we decided generally on the following broad principles of the Bill.

The first question was whether any retrospective effect should be given to the Bill. It was generally admitted that retrospective legislation should be avoided as far as possible. The tenancy law in Bengal is already far too complex and if retrospective effect is given it will lead to considerable litigation and multiplicity of suits. We are of opinion that such a course of action is bound to act ultimately as a great hardship on the poor tenants. Having regard to all these facts we decided not to give retrospective effect. Clause 1 was accordingly altered in the manner hereinafter noted.

On the question of pre-emption, we adopted the following principle which was moved by Dr. Radha Kumud Mookerji :—

“That in the case of the failure of a co-sharer tenant to pre-empt, the landlord should be given the right of pre-emption.”

We are also of opinion that some provisions should be made for the speedy realisation of rent. If suitable provisions are enacted they will not only benefit the landlord but will be of considerable assistance to the tenants who always find great difficulty in paying rent whenever there is an accumulation of rent. We also decided that unlike the certificate procedure the provisions to be enacted should be available to all landlords and tenants with reference to holdings. With this object in view the provisions of Chapter XIVA have been inserted.

All matters omitted by us have, as far as possible, been printed in italics and enclosed in square brackets and all new matters inserted by us have been underlined.

The changes made by us are detailed below :—

Clause 1.—In sub-clause (2) the amendment has been made on the basis of avoiding unreasonable delay for bringing the Act into force and also for avoiding complications that may arise if retrospective effect is given.

Clause 4.—The first two lines of proposed section 26C, sub-section (1) are unnecessary. The amendment proposed restores the language of the existing section.

In clause (1) the amendment has been proposed to do away with the necessity for notice on the landlord when the landlord himself is a party.

In sub-section (3) of proposed section 26C we think that the first two lines should be omitted as these words are unsuitable because now notices to co-sharers are necessary.

In sub-section (4) of proposed section 26C the proposed amendment relates to a drafting point only.

Sub-section (5) of proposed section 26C.—The first two amendments bring the notices to co-sharers within the scope of this sub-section. There are also a few other amendments which relate to points of drafting. An additional proviso has been inserted for the purpose of making necessary provision for adjusting landlord's rent-roll in the event of the transfer being set aside or modified.

Clause (a) of sub-section (6) of proposed section 26C.—The deletion is consequential upon the amendment to sub-section (3) and the addition is consequential upon the amendments made to sub-section (5) by the Bengal Legislative Assembly.

Clause (b) has been amplified on the lines of section 26-I (2) and a new clause (c) has been added because a judgment-debtor in a court sale is not ordinarily referred to as the transferor.

Clause 6, proposed section 26F—sub-section (5a).—We think it advisable to empower the Court to make equitable apportionment of the property among the co-sharers in certain cases and with this object in view this sub-section has been added.

Sub-sections (5b) to (5d).—We have decided that the landlord should have the right of pre-emption except in the case of a co-sharer and with this object in view these sub-sections have been added.

Sub-section (6).—The addition made here is consequential on our decision with regard to the right of pre-emption.

Sub-section (9).—This sub-section provides for an appeal as we are of opinion that an appeal should lie to the ordinary Civil Court.

Sub-section (10).—The provisions of this sub-section practically restores section 26J (3) which is necessitated by the restoration of the principle of pre-emption in the Bill.

Sub-section (11).—A definition of 'transfer' has been inserted here.

Clause 7.—We are of opinion that with regard to the usufructuary mortgages executed before the Bengal Tenancy (Amendment) Act of 1928 was passed it would operate less harshly and arbitrarily on the mortgagees of such mortgages if the period be extended to 25 years instead of 15 years as in the Bill and accordingly these amendments have been made in section 26G.

Clause 16.—We are of opinion that "Mundais" should be included in sub-section (2) of section 49A of the Act.

Clause 18.—The amendments are consequential upon the amendment to clause 6.

Clause 18A has been added which is consequential upon the introduction of the new Chapter XIV-A. *Vide* clause 33A.

Clause 20.—The first amendment relates to a drafting point. Section 58(3) of the Act deals with fine and not penalty. We are of opinion that an appeal shall lie to the District Judge rather than to the Commissioner and sub-section (2) has been drafted with this object. The first proviso should really be a substantive provision of law and as such has been incorporated as sub-section (3). The second proviso has been omitted as unnecessary.

Clause 21.—The changes proposed here relate to drafting points only.

Clause 22.—A new sub-section has been added to proposed section 85A to provide for an appeal.

Clause 24.—In proposed section 86A the changes made relate to drafting points only.

Clause 27.—The changes are consequential upon the amendment to clause 6.

Clause 30.—We are of opinion that the period of nine months is more suitable as rent will not be due at eleven months and the other changes proposed here are consequential upon the introduction of Chapter XIV-A.

Clause 33A.—A new Chapter XIV-A has been inserted here. The provisions of this Chapter deal with the summary procedure for the speedy realisation of rent by sale of the tenure or holding through the Courts.

Sections 177A to 177C.—Provide for the recovery of rent for not more than two years by an application ; the form of applications and other matters of procedure on such applications.

Section 177D.—Provides for the summary determination by Court of the claim and valuation, but such determination and other points relating to the tenancy may be contested by a suit.

Sections 177E and 177F.—Provide for the sale of the tenancy and the procedure ancillary thereto. The sale may be postponed on the tenant paying for every postponement not less than 15 per cent. of the dues but the total period of postponement not to exceed 5 months.

Section 177J.—The sale of the holding (other than an undivided share of land) will wipe out all other arrears of rent due in respect thereof from him, except to the extent that may be realised from the sale-proceeds. The landlord may proceed against the purchaser for the arrear of rent due.

Section 177K.—In the case of a tenure or holding (other than a holding of the nature referred to in section 177J) the landlord can institute a suit for the unrealised balance of the rent against other property of the tenant.

Clause 37.—The first change is consequential upon the amendment to clause 6 and the second change is consequential upon the introduction of the new Chapter XIV-A.

Clause 38.—The amendments proposed in sub-clause 3 (b) are consequential upon the changes made in clauses 4 and 6, respectively.

B. P. SINGH ROY, (*Chairman*).

*KADER BAKSH.

*HUMAYUN KABIR.

*A. H. CHOWDHURY.

*H. G. STOKES.

*D. H. WILMER.

*S. C. CHAKRAVERTI.

*MANMATHANATH BOSE.

*BROJENDRA MOHON MAITRA.

*LALIT CHANDRA DAS.

*REZZAKUL HALDER
CHOWDHURY.

*NAGENDRA NARAIN ROY.

*ABDUL KARIM.

*HAMIDUL HUQ CHOWDHURY.

*MOHAMMED IBRAHIM.

*NAZIRUDDIN AHMAD.

*MD. AKRUM KHAN.

*MUKHLESUR RAHAMAN.

*RADIHA BHUSAN ROY.

*ATAUR RAHAMAN.

*M. N. ROY CHOWDHURY.

*JATINDRA MOHON SEN.

*SAIYED MUAZZAMUDDIN
HOSAIN.

*RADIHA KUMUD MOOKERJI.

*BANKIM CHANDRA DATTA.
M. AHMED.

*SATISH CHANDRA MUKHERJEE.

LEGISLATIVE BUILDING, (Sd.) K. N. MAJUMDAR,
CALCUTTA, *Secretary to the Bengal Legislative Council.*
The 9th March, 1938.

**Report of the Select Committee of the Bengal Legislative Council
to which the Bengal Tenancy (Amendment) Bill, 1938,
was recommitted.**

[*Published in the Calcutta Gazette, March, 31, 1938*]

We, the members of the Select Committee to which the Bengal Tenancy (Amendment) Bill, 1938, as reported by the Select Committee was recommitted in order that the requirements of sub-section (3) of section 61 of the Bengal Legislative Council Rules and Standing Orders may be complied with have the honour to submit this our report.

2. The Bill was published in English in the *Calcutta Gazette Extraordinary* of the 27th August 1937.

3. The Bill as reported by the Select Committee was published in English in the *Calcutta Gazette* of the 17th March, 1938.

* Signed subject to a minute or minutes of dissent.

NOTE.—The signature of Raja Bhupendra Narayan Sinha Bahadur of Nashipur had not been received up to the time of printing this report.

4. In our opinion we consider that the Bill has not been so altered by our recommendations as to require re-publication and we recommend that the Bill be passed as amended.

B. P. SINGH ROY, (*Chairman*).

M. AHMED.

MUKHILESUR RAHAMAN.

MOHAMED IBRAHIM.

MD. AKRUM KHAN.

NAZIRUDDIN AHMAD.

RADHICA BHUSAN ROY.

REZZAKUL HAIDER

CHOWDHURY.

SAIYED MUAZZAMUDDIN

HOSAIN.

H. G. STOKES.

KADER BAKSH.

ATAUR RAHMAN.

MANMATHA NATH BOSE.

A. H. CHOWDHURY.

*IAJIT CHANDRA DAS.

*BROJENDRA MOHON MAITRA.

*JATINDRA MOHON SEN.

*S. C. CHAKRAVERTY.

*BANKIM CHANDRA DATTA.

HAMIDUL HUQ CHOWDHURY.

LEGISLATIVE BUILDING,

CALCUTTA,

The 26th March, 1938.

(Sd.) K. N. MAJUMDAR,

Secretary to the Bengal Legislative Council.

APPENDIX III

The Governor's Message to the Legislature

[See pages 2 to 4 of this book.]

APPENDIX IV

The Bengal Tenancy Ordinance, 1938

[See page 5 of this book.]

APPENDIX V

Proposed Amendments in the Bengal Government Rules.

[Published in the Calcutta Gazette, November 3, 1938, Part I, pp. 2354—2357.]

* Signed subject to a minute of dissent.

NOTE.—The signatures of (1) Dr. Radha Kumud Mookerji, (2) Maharaja Sir M. N. Ray Chowdhury, (3) Raja B. N. Sinha Bahadur, (4) Rai S. C. Mukharji Bahadur, (5) Mr. D. H. Wilmer, (6) Mr. Nagendra Narayan Roy, (7) Mr. Humayun Kabir, and (8) Khan Bahadur Abdul Karim could not be obtained as they were not present in the meeting.

REVENUE DEPARTMENT.

Land Revenue.

NOTIFICATIONS.

No. 911T.R.—22nd October 1938.—The following draft amendments which, in exercise of the powers conferred by section 189 and sub-section (6) of section 190 of the Bengal Tenancy Act, 1885 (VIII of 1885), the Governor proposes to make in the rules published under notification No. 5462L.R., dated the 26th March 1929, at pages 549-592 in Part I of the *Calcutta Gazette* of the 28th idem, as subsequently amended, is published, as required by sub-section (1) of section 190 of the said Act, for the information of persons likely to be affected thereby.

II. The draft will be taken into consideration on or after the 5th of December 1938, and any objection or suggestion with respect thereto which may be received by the undersigned before that date will be duly considered :—

Draft Amendments.

1. For the heading under Chapter V of the said rules *substitute* the following :—

“Levy and transmission of landlord’s fee and service of notices of transfers”.

2. In rule 24 of the said rules, *omit* the following :—

“the landlords’ transfer fee payable under sections 26C and 26E of the Act, and the fee payable to the landlord under sections 26H or 48H of the Act.

3. In sub-rule (1) of rule 25 of the said rules—

(a) for the word, figures, letters and brackets “18 (1) (a), 26C, 26E, 26F, 26H, 48H” *substitute* the word, figures, letter and brackets “and 18 (1) (a)” and

(b) for the words and figures “form Nos. 2 to 7” *substitute* the words and figures “form Nos. 2, 5 and 6”.

4. After rule 25 of the said rules *insert* the following :—

“25A. (1) Notices under section 26C of the Act shall contain so far as may be possible, the particulars given in form No. 2 appended to these rules. The party concerned shall file before the Registering Officer, Civil Court, Revenue Officer or Collector, as the case may be, one notice giving the particulars of the transfer and the names of all landlords and also of all co-sharer tenants who are not parties to the transfer with correct postal addresses, and as many more copies giving the said particulars as are necessary in order that one copy may be sent to each landlord and also to each such co-sharer tenant.

Notices
under sec-
tion 26C.

(2) For service of notices under sub-section (5) of section 26C of the Act the process fee shall be eight annas for each

copy of the notice which has to be posted to a separate address. The process fee shall be paid by court-fee stamp".

5. To rule 26 of the said rules *add* the following :—

"(4) The provisions of sub-rules (1) and (2) shall apply to notices for service on the landlords under section 26C of the Act referred to in sub-rule (1) of rule 25A".

6. In rule 29 of the said rules :—

(a) in sub-rule (1) *omit* the following :—

"except when separate payment is made on an application under sub-rule (9) or under the first proviso to section 26C(3) or under the proviso to section 26E(4) of the Act, in accordance with the next following sub-rules",

(b) omit sub-rules (2), (3) and (4),

(c) in sub-rule (5), for the words and figure "under rule 26" *substitute* the words and figure "referred to in rule 26",

(d) for sub-rule (6) *substitute* the following :—

"An application under sub-rule (1) may include two or more items of transfer fees provided that the applicants are the same and claim the same shares in each of the items", and

(e) *omit* sub-rules (7) and (9).

7. *Omit* sub-rule (6) of rule 29B of the said rules.

8. *Omit* rule 29D of the said rules.

9. For form No. 2 annexed to the said rules *substitute* the following :—

Form No. 2.

Notice of transfer for service on landlord and co-sharer tenants.
(See rules 25 and 25A.)

To

.....

Landlord, Common Agent, Common Manager or Co-sharer Tenant.

Take notice of the transfer of the tenancy specified in the schedule on the reverse.

The transfer has been registered at the.....sub-Registry Office on.....19 .

The sale of the tenancy (or decree or order absolute for the foreclosure of mortgage thereon) has been confirmed in the Court of.....at.....on.....19 . , in Execution/ Certificate Case No.....of 19.....

The landlord's fee of Rs.....is in deposit in collectorate by chalan No....., dated.....

In the case of a sole landlord or where there is a common agent or common manager for all the co-sharer landlords, the amount will, on receipt of acknowledgment of this notice, be sent by postal money order to the landlord, common agent or manager, as the case may be.

In the case of co-sharer landlords without a common agent or common manager payment will be made on the joint application and receipt of all the co-sharer landlords.

Sub-Registrar.

Revenue Officer.

Collector.

Judge.

N.B.—The Sub-Registrar, Revenue Officer, Collector or Judge shall strike out the paragraphs which are inapplicable.

Names and postal addresses of all landlords *[and all co-sharer tenants].

Item No. in the schedule.	Names of landlords *[and co-sharer tenants].	Postal address.	Name and postal address of common agent or com- mon manager, if any.

*Strike out when the notice of transfer is not under section 26C of the Act.

(Reverse.)

Schedule.

Column 1. Name, father's name and residence of transferor or judgment-debtor.

Column 2. Name, father's name and residence of transferee or decree-holder.

Column 3. Nature of transfer. (In case of sale, name, father's name and residence of purchaser also to be given.)

Column 4. Item number in the document or of sale or foreclosure.

Column 5. Name of estate and tauzi number.

Column 6. Village and thana in which the land is situated.

Column 7. Khatian number of the landlord of the tenancy transferred.

Column 8. Khatian number of the tenancy transferred (when a whole tenancy is not transferred particulars of the plots transferred to be given).

Column 9. Nature of the tenancy (permanent tenure, rent-free, mukarari or occupancy holding).

Column 10. Extent of interest transferred.

Column 11. Annual rent of the tenancy.

Column 12. Proportionate rent in case of transfer of a portion or share of tenancy.

Column 13. Consideration money or value as set forth in the document of transfer or sale price in case of sale in execution of decree or certificate or market value determined by Court in case of foreclosure of mortgage.

Column 14. Amount of landlord's fee paid.

Column 15. Remarks.

To

.....
Landlord, Common Agent, Common Manager or
Co-sharer Tenant.

Village.....

Post Office.....

District.....

From

..... (Sub-Registrar, Revenue
Officer, Collector or Judge).

10. *Omit* forms Nos. 3 and 4 annexed to the said rules.

11. In form No. 5 annexed to the said rules—

(a) *omit* the word and brackets “(transfer)”, and

(b) for the marginal note *substitute* the following:—
“Enter section 12 or 18 as the case may be”.

12. *Omit* forms Nos. 7 and 7A annexed to the said rules.

APPENDIX VI

Bengal Government Notification

[Notification No. 8737 L.R., dated the 10th August, 1934.]

FORM No. 13A.

Concise Statement of the Proclamation of Sale of
Tenure or Holding.

(See rule 74A.)

[Section 163 of the Bengal Tenancy Act, 1885 (VIII of 1885).]

(To be published in the local official gazette or in a local newspaper, or in both.)

							Description of property				
Execution Case No. and name of the Court.	Whether sale proclamation issued under clause (a) or clause (b) of section 163 (2).	Decree-holder.	Judgment-debtor.	Amount for which the property has been ordered to be sold.	Place, date and time of sale.	Nature of interest.	Police-station and jurisdiction list No. and name of village.	Khatian or plot number, if known, or other sufficient description.	Area, if known.	Rent payable, if known.	Remarks.
1	2	3	4	5	6	7	8	9	10	11	12

(Notification No. 8737 L.R., dated the 10th August, 1934.)

APPENDIX VII

Bengal Government Press Note, dated the 4th September, 1938,
regarding Deposit of Landlord's Transfer Fees.

The legal position regarding the deposit of landlord's transfer fees on presentation of a document for registration in the light of the Bengal Tenancy Ordinance and the amendment of the tenancy law by the Amending Act VI of 1938 is interpreted in a Bengal Government Press Note as follows:—

The Bengal Tenancy Ordinance, 1938, which was published in the *Calcutta Gazette Extraordinary* of June 3, 1938, provides that

the period from May 31, 1938, till the date of expiry of the Ordinance is to be excluded in computing any time prescribed by law within which any document of transfer in relation to which the provisions of section 26C (2) of the Bengal Tenancy Act (requiring deposit of landlord's transfer fees on presentation of a document for registration) shall be presented for registration.

It also stays the power of courts to take action for non-payment of landlord's transfer fees. That Ordinance expires on September 8, 1938.

Section 26C (2) of the Bengal Tenancy Act has been amended by the Bengal Tenancy (Amendment) Act, 1938, which came into force on August 18, 1938, so that the requirement of the law which prevented a registering office from registering a document of transfer unless the landlord's fee was deposited, is no longer in force.

LEGAL POSITION

Similarly, the provisions of section 26C (4) and section 26E (1) which required deposit of transfer fee in the case of certain court transfers are no longer in force.

It has been brought to the notice of Government that in some cases registration authorities are demanding transfer fees on documents of transfer of occupancy holdings though presented after the new Act came into force, presumably on the ground that the documents when registered will operate from the time of execution, which may be prior to August 18, 1938.

It is also reported that in certain cases of court transfers deposit of landlord's transfer fee is being required, apparently on the ground that the sales took place before the new Act came into operation and as such the provisions of the old Act should be applied.

Government have examined the legal position and are of opinion that though a transfer may operate from the date of execution of a document under section 47 of the Indian Registration Act (Act XVI of 1908), and this date may be prior to the date of the amendment of the Bengal Tenancy Act, the provisions of the law under which such payments are enforced being themselves no longer in force, landlord's transfer fees cannot, after August 18, 1938, be demanded.

APPENDIX VIII

The Bengal Tenancy (Second Amendment) Bill, 1938, for Amendment of Sec. 68.

[Published in the Calcutta Gazette, March 17, 1938, Part IVA,
pages 22-23.]

GOVERNMENT OF BENGAL.

Legislative Department.

NOTIFICATION.

No. 206L.—14th March 1938.—The Governor having been pleased to order, under rule 19 of the Bengal Legislative Assembly

Rules, as modified and adapted under section 84(3) of the Government of India Act, 1935, the publication of the following Bill, together with the Statement of Objects and Reasons which accompanies it, in the *Calcutta Gazette*, the Bill and the Statement of Objects and Reasons are accordingly hereby published for general information.

The Bengal Tenancy (Second Amendment) Bill, 1938.

**A
BILL**

further to amend section 68 of the Bengal Tenancy Act, 1885,

WHEREAS it is expedient to reduce the maximum rate of damages which may be awarded under the provisions of section 68 of the Bengal Tenancy Act, 1885, and for that purpose further to amend the the said section in the manner hereinafter provided :

It is hereby enacted as follows :—

1. This Act may be called the Bengal Tenancy (Second Amendment) Act, 1938. Short title.
2. In section 68 of the Bengal Tenancy Act, 1885, for the word "twenty-five" in both places in which it occurs the words "twelve and a half" shall be substituted. Amendment of section 68 of Act VIII of 1885.

Statement of Objects and Reasons.

In the Bengal Tenancy (Amendment) Bill, provision has been made for the reduction by half of the rate of interest payable on arrears of rent. The object of the present Bill is to make a corresponding reduction in the maximum rate of damages that may be awarded under section 68 of the Bengal Tenancy Act, 1885.

CALCUTTA :
The 14th March 1938.

(Sd.) B. P. SINGH ROY,
Member-in-charge.
By order of the Governor,
(Sd.) H. D. BENJAMIN,
Secy. to the Govt. of Bengal.

APPENDIX IX

**The Bengal Tenancy (Third Amendment) Bill, 1938,
for Amendment of Sec. 52.**

[Published in the *Calcutta Gazette*, September 22, 1938,
Part IVB, pages 183-185.]

GOVERNMENT OF BENGAL.

Legislative Department.

NOTIFICATION.

No. 896L.—16th September 1938.—The Governor having been pleased to order, under rule 19 of the Bengal Legislative Council Rules, 1920, as modified and adapted for the Bengal Legislative

Council and for the Bengal Legislative Assembly, respectively, under section 84(3) of the Government of India Act, 1935, the publication of the following Bill, together with the Statement of Objects and Reasons which accompanies it, in the *Calcutta Gazette*, the Bill and the Statement of Objects and Reasons, are accordingly hereby published for general information :—

The Bengal Tenancy (Third Amendment) Bill, 1938.

A BILL

further to amend section 52 of the Bengal Tenancy Act, 1885.

VIII of
1885.

Whereas it is expedient further to amend section 52 of the Bengal Tenancy Act, 1885, in the manner hereinafter affirming ;

It is hereby enacted as follows :—

Amendment
of section
52 of
Act VIII
of 1885.

1. This Act may be called the Bengal Tenancy (Third Amendment) Act 1938.

2. In section 52 of the B. T. Act, 1885—

(1) In clause (a) of sub-section (1) after the words “without any reduction of the rent being made” the following proviso shall be inserted, namely :—

“Provided that no Court shall decree any addition of rent under this clause unless it is satisfied that there has in fact been an increase in the actual area of the tenure or holding since the rent previously paid was settled”, and

(2) after sub-section (1) the following sub-section shall be inserted, namely :—

“(1A) In determining in a suit under clause (a) of sub-sec. (1) whether there has been an increase in the actual area of the tenure or holding, the Court shall inquire as to whether the present areas of other tenures or holdings in the vicinity which were settled at or about the same time or on the same standard of measurement as the tenure or holding in suit, show increase in area compared with the area originally settled similar to that alleged in respect of the tenure or holding in suit : if such similar increases are found to exist, it shall be presumed that there has in fact been no increase in the actual area of the tenure or holding in suit since the rent previously paid was settled”.

Application.

3 (1). Notwithstanding anything contained in any other law—

(a) the provisions of section 52 of the Bengal Tenancy Act, 1885, as amended by this Act, shall apply to all suits instituted thereunder on or after the commencement of this Act, and also, subject to such conditions as may be prescribed, to all suits under clause (a) of sub-section (1) of that section which are pending on the said date, and

(b) if a decree has been passed before the commencement of this Act in a suit under the said clause instituted on

or after the twenty-seventh day of August, 1937, the Court shall, on application accompanied by the prescribed fee and made within six months from the commencement of this Act by a tenant against whom such decree has been passed, set aside the decree and restore and rehear the suit in the prescribed manner and in accordance with the provisions of the said section as amended by this Act.

(2) In this section "prescribed" means prescribed by rules made by the Provincial Government hereunder.

Statement of Objects and Reasons.

Section 52 of the Bengal Tenancy Act provides for an increase of rent where it can be proved that there has been an increase of area of a tenure or holding. Government have reasons to believe that the provisions of this section have been abused in the following manner. Settlement was made on a cubit, say, of 22 inches in the past. When the record-of-rights was prepared and the standard cubit of 18 inches was applied in measuring the land, there was an apparent, but not real, increase in the number of *bighas* in the tenure or holding. With the help of misleading evidence it is often proved that in fact the standard of measurement which had been used at the time of the settlement was an 18 inch cubit. In order to prevent this kind of fraud the present amendment of section 52(1) has been framed. It is not intended that a landlord should be debarred from obtaining additional rent for additional area which in fact exists owing to gradual encroachment on his *khas khamar* or on neighbouring plots.

It will also not debar the case where additional area has been gained through alluvial action or the drying up of swampy ground contiguous to a tenure or holding. In either of these two latter cases a landlord may avail himself of the provisions of section 52 of the Bengal Tenancy Act, 1885, although he is not bound to do so as it has been held in the Calcutta High Court that he is entitled to sue in the Courts under the general law of the land irrespective of the Bengal Tenancy Act for additional rent in cases where it can be demonstrated that a particular area of land has been added to the original tenure or holding.

The Bill also provides that by application to the Courts tenants against whom suits were instituted under s. 52 after the 27th August, 1937 [the date of publication of the B. T. (Amendment) Bill, 1938] may, whether a decree has been passed or not, obtain a re-opening of the case in order that it may be decided under the provisions of section 52 as sought to be amended by the present Bill. This would naturally entitle both sides to amend their original pleadings if they desired, and to this end rule-making power is sought in order not to encumber the Act with small matters of procedural detail which will only be of temporary effect.

(Sd.) B. P. SINGH ROY,
Member-in-charge.

By order of the Governor
(Sd.) H. D. BENJAMIN,

Secy. to the Govt. of Bengal.

Calcutta,
The 12th September, 1938.

APPENDIX X

The Bengal Rates of Interest Bill, 1937.

[Published in the Calcutta Gazette, March 17, 1938, Part IVA,
pp. 20-22.]

GOVERNMENT OF BENGAL.

Legislative Department.

NOTIFICATION.

No. 200L.—12th March 1938.—The Governor having been pleased to order, under rule 19 of the Bengal Legislative Assembly Rules, as modified and adapted under section 84 (3) of the Government of India Act, 1935, the publication of the following Bill, together with the Statement of Objects and Reasons which accompanies it, in the *Calcutta Gazette*, the Bill and the Statement of Objects and Reasons are accordingly hereby published for general information.

The Bengal Rates of Interest Bill, 1938.**A****BILL**

to reduce the rates of interest payable on certain dues.

WHEREAS it is expedient to reduce the rates of interest payable on certain dues and for that purpose to amend certain Bengal Acts in the manner hereinafter specified ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Bengal Rates of Interest Act, 1938.

Amendment of certain Bengal Acts. 2. The Bengal Acts mentioned in the Schedule are hereby amended to the extent and in the manner specified in the fourth column thereof.

THE SCHEDULE.

(See section 2.)

Year.	No.	Short title.	Provisions amended.
1	2	3	4
1862 ...	VI ...	The Bengal Rent Act, 1862 ...	<p>(1) In the second paragraph of section 2, for the word "twelve" the words "six and a quarter" shall be substituted.</p> <p>(2) In section 3, for the word "twelve" the words "six and a quarter" shall be substituted.</p>
1880 ...	IX ...	The Cess Act, 1880 ...	<p>(1) In section 45,</p> <p>(a) in sub-section (2), for the words "twelve and a half" the words "six and a quarter" shall be substituted; and</p> <p>(b) the proviso to sub-section (2) shall be omitted.</p> <p>(2) In sections 47, 58, 62 and 70, for the words "twelve and a half" the words "six and a quarter" shall be substituted.</p>
1913 ...	III ...	The Bengal Public Demands Recovery Act, 1913.	In clause (a) of sub-section (1) of section 22, for the words "twelve and a half" the words "six and a quarter" shall be substituted.
1935 ...	XVII	The Bengal Land Revenue (Interest) Act, 1935.	In clause (b) of sub-section (2) of section 2, for the words "seven and a half" the words "six and a quarter" shall be substituted.

Statement of Objects and Reasons.

In the Government Bill to amend the Bengal Tenancy Act, 1885, it has been proposed to reduce the rate of interest on arrears of rent from twelve and a half *per centum* to six and a quarter *per centum*; in this Bill it is proposed to reduce to the same figure the rates of interest on arrear dues under certain other enactments.

CALCUTTA :
The 11th March, 1938.

(Sd.) B. P. SINGH ROY,
Member-in-charge.

By order of the Governor,
(Sd.) H. D. BENJAMIN,
Secy. to the Govt. of Bengal.

APPENDIX XI.

Extracts from the Assembly Proceedings and Council Debates
on the Bengal Tenancy (Amendment) Bill, 1937.

*Assembly
Proceed-
ings: Vol.
51, No. 4
Second
session
September,
1937.*

Sir George Campbell in moving for circulation of the Bill said "My first objection to taking the bill into consideration on the floor of the House is the speed with which this measure has been thrust upon us. There was a compromise on the question of rights in 1928 and I cannot see in view of its magnitude the necessity for this hasty legislation. * * * From the Instrument of Instructions it is perfectly plain to everyone that the nature of the Bill is such that it must go to His Excellency the Viceroy. It seems to me that the general tendency of this legislation apart from whether or not it benefits the tillers of the soil is to deal a definite blow at the landlords who are on the verge of expropriation.* * * Why should we stop here and why not deprive everyone of his right to property? I do not think this House can say unanimously that the Bill has general public support".

Mr. W. C. Wordsworth, in supporting the motion for circulation, said "This is a hastily drafted measure, ill-considered or rather little considered, born of panic, the outcome not of patient investigation of all the factors of the problem, but of an emotional response to the difficulties of the moment.* * * Is it sufficient to base policy on promises made to get votes in the heat of an election campaign?" In opposing the motion to pass the Bill he said, "We believe that there is a considerable amount of class prejudice in it and that it makes no sincere endeavour to find where social justice lies between landlords, tenants, intermediaries and Government. We believe it is not the result of freedom of thought and will, but is in a sense a dictated measure. What we wanted in Bengal was a simplifying measure, whereas the Bill as it at present stands is a complication of complications, making confusion worse confounded. We believe that land-tenure policy in Bengal, on which the social structure depends, cannot be constructed in a hurry. We believe that the House and the Province have been badly treated in that no reasonable time has been given to them to consider a measure that is full of complexity."

Kumar Shibekhareswar Roy said "Permit me at the outset to record my emphatic protest against the manner in which the Government seems to be determined to deal with the Bill. It has done away with two important but normal stages of the bill, namely, elucidation of public opinion and reference to a Select Committee of the House. This is something unique and novel in the history of the Bengal Legislature. This bill was published in an extraordinary issue of the Calcutta Gazette on the 27th August; on the 28th of August the Government announced its intention of referring the Bill to a Select Committee, when all on a sudden, on the 2nd September it changed its mind and decided to proceed with its consideration from the 10th and the members of the Assembly were only given five days time to send in amendments. We feel that an act of great injustice is going to be perpetrated on the landholders by the provisions of the bill."

Maharaja Sir Manmatha Nath Roy Choudhury in opposing the motion in the Council for consideration of the Bill said "The Bill in question infringes sec. 299 (1) and (2) of the Government of India Act, 1935. I beg to submit that the essence of the contract as embodied in Regulation I of 1793 is the recognition by the Government of the Zemindar as the actual proprietor of the land. On the other hand, the rights of pre-emption and the right to demand and obtain transfer-fees are also rights in land and these are being taken away by the Bill under review without providing for the payment of any compensation whatsoever to the possessors of those rights as contemplated in sec. 299 of the Government of India Act, 1935. The Zemindars are entitled to compensation and compensation must be provided for in this Bill of expropriation. Without such a provision the Bill in my considered opinion cannot be introduced and it must be held that it infringes sec. 299 sub-sec. (2) read with sub-sec. (5). The *Maharaja* in moving for circulation of the Bill said "I honestly feel that the piece of legislation which is being presented to us for our consideration is a gross slur upon the present administration of Bengal inasmuch as it not only seeks to break the solemn pledges which were given by the Hon'ble Court of Directors in 1793 as irrevocable * * but also seeks to defeat the solemn purpose of His Majesty the King-Emperor's Instructions to Governor and Governor-General with reference to section 299 (3) of the Government of India Act, 1935, as contained in the Instrument of Instructions. The present Bill, if enacted, is sure to be a lawless law. It will completely revolutionise the present land system in Bengal. * * * It will violently shake the foundation of our economic life in our rural areas. Any measure which does not respect fundamental rights or sanctity of contracts must be calculated to be revolutionary and I shall not be surprised if the Bill, when enacted, becomes a new nightmare to strike terror into the hearts of our people."

*Council
Debates:
Vol. I No. 7
February,
1938.*

Maharaja Kumar Uday Chand Mahatab said in supporting the motion "The Bill aims mainly at expropriation and it is in the garb of a popular Bill but it is merely an election propaganda of a certain section of the House."

Mr. Tulsi Chandra Goswami in supporting the motion for reference to a Select Committee said "I consider this Bill as a very dishonest measure. This is supposed to give rights to the tillers of the soil. It does nothing of the kind. Remember this that a Bill which seeks to amend the most complicated piece of legislation in India must be drafted even from the legislative point of view with due regard to juristic principles and I fail to see how in a House of 250 members it is possible dispassionately, quite apart from rights and other political considerations, to frame an amending Bill properly which would fit in with the old Act and not give rise to endless litigation."

Mr. Jatindra Nath Basu said "We have introduced provisions which will give the raiyats unrestricted facilities of alienating holding ; there is practically no restraint left on him. The result will be, what we can easily contemplate, that he is likely to come into the hands of money-lenders and persons who can buy him up and he will gradually tend to disappear. Sir, taking the figures of the census of 1921 and 1931 we find that while the number of land-

less agricultural labourers in this province in 1921 was 18 lakhs only, in 1931 the number of landless labourers rose to 27 lakhs. * * * The tenants who cultivated their lands were 92 lakhs in 1921 and only 60 lakhs in 1931."

Mr. Sarat Chandra Bose said "We said more than once, that the present Bill was a hasty and ill-considered piece of legislation, inadequate for the purpose for which it was intended, and hypocritical, because it pretended to remove the grievances of the actual tillers of the soil, many of whose disabilities is totally ignored and which still remain ignored."

*Council
Debates :
Vol. I,
No. 31,
April, 1938.*

Dr. Radha Kumud Mukherji in course of the debate on the passage of the Bill in the *Council* said "The Bill frankly speaking, has been introduced to lessen the burden of the cultivators and sometimes it required a great strain on the intellect to find out how actually the burdens on the actual cultivators are going to be removed. * * * I am afraid that with this kind of piecemeal legislation, this kind of half-hearted measure we are really not yet in a position to confer any lasting good upon the peasants. But yet with all these shortcomings of the Bill and in spite of the inherent defects to which I have referred, Congress as a party are not prepared to oppose the passage of the Bill for the simple reason that this Bill does contain some element of good for the tenant."

Maharaja Sashi Kanta Acharya Choudhury said "No sound economic principle has been followed in the Bill nor ordinary legal principle. But the Government are rushing it through without any reason whatsoever, simply to satisfy the pledges given by some of the members. Sir, what is it that the Government is really effecting by this measure. * * * The view-point of the Minister in charge of the Bill is difficult to understand. He would defer the legislation for the benefit of the actual tillers of the soil till the findings of the proposed Commission were out, but the interests of the intermediaries have appeared to Government to be so urgent that the Bill must be rushed through, even at the cost of expropriating the Zemindars."

*Assembly
Proceedings: Vol.
51, No. 4
Second
session,
September
1937.*

The Chief Minister Mr. Fazlul Huq on the motion for introduction of the Bill in the Assembly, said "at one time the Government thought that the best way to deal with situation would be to send the Bill to a Select Committee. As soon, however, as that decision of Government became known, some persons bent on mischief went on creating trouble and agitation in the country to the effect that Government were going to shelve the consideration of the Bill. Government were prepared to face that situation also. But it became evident that the agitation was growing in intensity from day to day, and they thought that the best way to deal with the situation would be to leave the matter to the individual discretion of the members.

On the motion for passing the Bill in the Assembly *the Chief Minister* concluded "Sir, I wish I could go a little more deeply into the clauses of the Bill to show what we have been able to achieve. We have abolished the landlord's transfer-fees and the right to pre-emption. We have repealed Chapter XIII A which allows landlords the use on certain conditions of the certificate pro-

cedure for realising their rents. We have given under-raiyats the right to surrender their holdings. We have imposed summary penalty for the exaction of abwabs. We have empowered Government—not merely suspended for a period of 10 years—to suspend any or all of the provisions of the Act relating to the enhancement of rent which benefits both raiyats and under-raiyats. We have given tenure-holders the right to surrender their tenures. We have allowed landlords to sue for a portion of their arrears of rent instead of for the whole amount. We have given increased facilities for the sub-division of tenures and holdings to such an extent that one has to consider whether it will go beyond the line of safety. We have provided for the suspension or abatement of rent when a tenure or holding is lost by diluvion. We reduced the rate of interest on arrears of rent from 12 per cent. to 6¼ per cent. We have given occupancy under-raiyats the same rights of transfer as occupancy-raiyats. And we have given facilities to occupancy-raiyats to regain possession, under certain conditions of mortgaged holdings. We can improve more, but I think that is sufficient for the present. It is no mean achievement as a good beginning and during the short time at our disposal.”

On the motion for passing the Bill as settled in the Council, **Maharaja Sir Manmatha Nath Roy Choudhury** said “In consequence of the manner in which our legitimate amendments to the various iniquitous and illegal provisions of the Bill which is now under review has been thrown out, my party has come to the conclusion that our presence in this House can no longer be of any use and that we cannot continue to participate in the deliberations over the question which is now before us. * * * * We now feel that the Select Committee was intended to be a mere eye-wash created with the ulterior motive of washing out the sin of omission of which the Assembly stood guilty in the eye of the civilised world for passing a measure of expropriation without even a reference to a Select Committee. * * * * We feel that we cannot remain here with any sense of self-respect as the majority are bent upon tyrannising the helpless minority for political aggrandisement. We further feel that we cannot have any justice here and that we must seek protection elsewhere and if need be we should seek the protection of the Governor or of the Governor-General, and if necessary of the Federal Court or of the British Parliament through the Right Hon’ble the Secretary of State. Above all, we shall take our stand upon the Instrument of Instructions created by His Imperial Majesty the King-Emperor for the vindication of the Permanent Settlement which is the bulwark of the economic structure of Bengal, so far as it relates to agriculture.”

*Council
Debates:
Vol. I No.
31, 1st
April, 1938.*

APPENDIX XII

Terms of Reference to the Bengal Land Revenue Commission, 1938.

[Published in the Calcutta Gazette, Extra-ordinary,
November 5, 1938.]

The Terms of Reference to the Commission are :

Generally, to examine the existing land revenue system of Bengal in its various aspects, with special reference to the Permanent Settlement to estimate the effect of the system on the economic and social structure of Bengal ; and its influence on the revenues and administrative machinery of the Provincial Government ; to appraise the advantages and disadvantages of the existing system and to advise what modifications, if any, can and should be made, and in what manner, and in what stages they should be effected. In particular, to examine the following questions :

(1) To what extent are the underlying principles of the Permanent Settlement of value to the social and economic structure of Bengal? Have those principles been defeated by the commercialization of cultivating rights in land and, if so, to what extent would it be possible and expedient to reassert them by revising the process of commercialization?

LEVEL OF RENTS.

(2) Comparing permanently-settled estates with temporarily-settled estates and Government estates, and comparing also the general level of rents in other Provinces and the economic condition of cultivators in Bengal with their condition in other Provinces, what is the case for adjusting the general level of rents of agricultural land in Bengal in one direction or another?

(3) How has the existing machinery for fixing fair and equitable rents in Government and temporarily-settled estates in Bengal worked and how can it be improved? Are there adequate grounds for setting up an organization for fixing fair rents for cultivators throughout the Province at regular intervals? On what principles should the fixing of fair rents proceed? Is a general fixing of fair rents possible without a radical alteration of the existing land revenue system?

(4) Would it be financially and economically sound to fix the rents of cultivators in perpetuity?

(5) Is it practicable and advisable for Government to acquire all the superior interests in agricultural land so as to bring the actual cultivators into the position of tenants holding directly under Government? If so, what would be the probable cost of such an operation, how long would it be likely to take, and what would be its probable consequences on the economic, financial, administrative, and social structure of the Province?

SUB-INFÉUDATION.

Would it be practicable to maintain the actual cultivators in the position of direct tenants of Government and, if so, by what method and what would be the implications of such a proposal?

(6) How far has sub-infeudation among landlords and *raiyls* affected their economic position as holders of land and to what extent can such position be improved by restrictions on sub-infeudation?

(7) To what extent can the credit value of holdings be raised and the borrowing facilities of cultivators improved by reducing the fragmentation of proprietary interest in holdings and by the maintenance of reliable records of title?

(8) Does the existing procedure in Civil and Revenue Courts for realization of rents operate efficiently and without undue hardship to tenants? What are the defects of the existing procedure, and what measures should be taken to remedy those defects?

REVENUE DEPARTMENT.

Land Revenue.

Resolution No. 22716 L.R., Calcutta, the 5th November, 1938.

In pursuance of the announcement made in resolution No. 6414 L.R., dated the 2nd April, 1938, published in an extraordinary issue of the *Calcutta Gazette* of that date, in regard to the decision of the Government of Bengal to appoint a Commission to enquire into the existing land revenue system of Bengal, the Governor is pleased formally to constitute the said Commission composed of the following personnel :—

Sir Francis Floud (*Chairman*) ; *Members* : Sir Bijay Chand Mahtab, Maharajadhiraja Bahadur of Burdwan, Mr. M. O. Carter, I.C.S., Khan Bahadur Saiyed Moazzamuddin Hossain, M.L.C., Khan Bahadur Maulvi Hashem Ali Khan, M.L.A., Mr. S. M. Masih, Barrister-at-Law, Khan Bahadur M. A. Momen, C.I.E., Sir M. N. Mookerjee, Dr. Radha Kumud Mookerjee, M.L.C., Mr. Brojendra Kishore Roy Choudhury and Sir F. A. Sachse. The names of two more Moslem members and one Scheduled Caste member will be announced later. Mr. M. O. Carter, I.C.S., will act as *Secretary* to the Commission.

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